No. (1)

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHRISTOPHER S. SIDWELL,

Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC. and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit err in deciding that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 *et seq.*, applies only to a site physically contiguous with and actually touching the navigable waters of the United States?

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Decision of the United States Court of Appeals for the Fourth Circuit: Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

STATEMENT OF JURISDICTION

The immediate case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The Administrative Law Judge of the U.S. Department of Labor had jurisdiction to hear the claim, and the Benefits Review Board had jurisdiction to hear the appeal therefrom, under Sections 919(c) & (d) and Section 921(b)(3) of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal from the

Benefits Review Board pursuant to Section 921(c) of the LHWCA. The decision of that court was rendered on December 28, 1995. A sua sponte Suggestion of Rehearing en banc was raised subsequent to the rendering of that decision. That Reconsideration was denied by the Court of Appeals by Order filed on January 29, 1996.

This Court has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit by way of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

33 U.S.C. Section 903(a):

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The matter was heard before Administrative Law Judge Richard K. Malamphy of the United States Department of Labor to determine whether there was jurisdiction under the Longshore Act with respect to injuries suffered by Petitioner, Christopher S. Sidwell, on June 11, 1990. Petitioner was injured at a site regularly used by his employer to repair ship loading and unloading equipment, specifically containers and their chassis. Respondent, Express Container Services, Inc., had relocated its container repair facility from a site immediately adjoining Portsmouth Marine Terminal in Portsmouth, Virginia to a location off-terminal due to terminal expansion and the terminal's need for Respondent's site. Respondent's off-terminal location is more spacious and efficient, and, as a result, Respondent's maritime business was improved in the new location.

Judge Malamphy issued a Decision and Order on May 7, 1992 denying compensation benefits to Petitioner because he found that

the locus of Petitioner's injuries did not meet the situs test for jurisdictional coverage under the Longshore Act (App.C. at LXI-LXII).[2]

Claimant requested review before the Benefits Review Board of the U.S. Department of Labor. The Board issued a Decision and Order, dated December 29, 1994, affirming the decision of the Administrative Law Judge. The Board determined that the container repair facility in question was not a covered situs under the jurisdictional requirements of the LHWCA (App.B. at XLVI-XLVII).

Claimant requested review before the United States Court of Appeals for the Fourth Circuit. In an Opinion, written by Judge Luttig, and joined in by Judge Widener, a panel of the Court of Appeals affirmed the decision of the Benefits Review Board and held that the locus of Petitioner's injuries was not a covered situs under the LHWCA. The Court of Appeals held that coverage for those injuries was barred, stating:

> Accordingly, we hold that an area is "adjoining" navigable waters only if it "adjoins" navigable

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[2] Page citations referenced by "App." will refer to the various Appendices attached to the immediate Petition for Writ of Certiorari.

> waters, that is, if it is "contiguous with" or otherwise "touches" such waters.[] If there are other areas between the navigable waters and the area in question, the latter area simply is not "adjoining" the waters under any reasonable definition of that term.

71 F.3d 1134, 1138-39 (App.A. at XVII-XVIII) (footnote omitted). Further, in a footnote omitted for purposes of the above citation, the Court of Appeals stated as follows:

> Sidwell argues that whether terminal expansion has forced relocation from a site directly adjoining navigable waters to one that does not adjoin such waters (but is the closest feasible), is relevant to whether a particular site adjoins navigable waters. We disagree. The exigency of even a forced relocation cannot transform a site distant from navigable waters into one that somehow "adjoins" those waters. The site either adjoins navigable waters or it does not . . . .

71 F.3d at 1139 (App.A. at XVII-XVIII).

In a concurring Opinion, Judge Beaty

voiced his disagreement with the creation of a more restrictive situs test than those previously pronounced and applied in both the Fourth Circuit and other federal circuits. In so doing, Judge Beaty stated:

> The majority, however, now favors creation of a more literal interpretation which will serve to exclude coverage, if the site in question does not actually touch navigable waters. This new test is crafted by defining "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" as merely an extension of the enumerated sites which actually touch navigable waters. Such an interpretation would render the additional proviso superfluous. Congress by use of the phrase "or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel" provided a description of additional areas that would satisfy the situs test without actually requiring these additional sites to actually touch navigable waters. If Congress intended to further limit coverage, there would have been no need to describe additional covered

sites beyond those already enumerated in the statute.

71 F.3d at 1143 (App.A. at XXXI-XXXII).

Petitioner now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals in this case is in direct conflict with the decisions of the Courts of Appeals in three other judicial circuits.*

Section 3(a) of the LHWCA establishes the jurisdictional requirements for coverage under the Act. The provision provides for coverage for disability to or death of an employee where the injury occurs "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. Section 903(a). The descriptive language in the parentheses was not contained within the provision as originally enacted, but instead was added through the 1972 amendments to the LHWCA. In the Senate and House Committee Reports corresponding to the addition of this language, Congress indicated that the intent behind the addition of the language was "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep.

No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972) (emphasis added); H.R. Rep. No. 92-1141, 92nd Cong., 2d Sess. (1972) (emphasis added), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4707-08. Accordingly, although the Act did not previously cover injuries occurring on land, Congress altered the language to provide for such coverage. In doing so, the Senate Report enunciated the belief embodied in the amendment "that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Id.

Courts interpreting the jurisdictional reach of the LHWCA subsequent to the 1972 amendments have uniformly interpreted the Act as requiring both "status" and "situs" in order to invoke the coverage of the Act. See, e.g., Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977). The former refers to the nature of the work generally performed by the employee in question and is governed by the definition of "employee" in Section 902(3) of the LHWCA and the use of that term in Section 903(a) of the Act. The latter, which is at issue in this case, refers to the actual location where the injury occurred and its relationship to the navigable waters of the United States.

While generally uniform with respect to the existence of the status and situs tests, courts interpreting and applying the situs requirement have invariably utilized very divergent tests to determine whether a given claimant is covered under the Act. The most prominent, prior to the immediate case, were the tests enunciated in the cases of Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), and Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).[3]

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[3] Note that the U.S. Court of Appeals for the Third Circuit enunciated a third situs test in the case of Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976). In that case, the court stated that "[a]s long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available[, because] [r]esuscitating the situs requirement in cases satisfying the status test [would] interfere with Congress' intention to eliminate the phenomenon of shifting coverage." 540 F.2d at 638. In keeping with that standard, the Sea-Land court appeared to favor a case-by-case approach whose focus is not the geographic relationship with the navigable waters of the United States, but the "location of the interface between the air[,] land and the water modes of transportation." Id. at 638.

In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977), this Court noted that the Sea-Land test "appears to have essentially discarded the

In the 1978 case of Brady-Hamilton, the Court of Appeals for the Ninth Circuit delineated a situs test which mandated consideration of four factors in making the situs determination: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) proximity to the waterway; and (4) whether the adjoining site is as close to the waterway as feasible. 568 F.2d at 141. In doing so, the Ninth Circuit interpreted the "adjoining area" language in Section 903(a) as describing a "functional relationship that does not in all cases depend upon physical contiguity." Id. In addition, the Brady-Hamilton court underscored that a primary consideration in making the situs determination is the extent to which the choice of the site upon which the injury occurred was governed by considerations of maritime economy. Id. Upon application of the above test, the Brady-Hamilton court held that a contract stevedore's gear lockerman, who was injured while unloading steel plates from a pickup truck parked at a gear locker

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situs test." Id. at 277 n.40. Accordingly, the case is noted for illumination of the lack of uniformity among the circuits, but is not further relied upon in the immediate Petition.

located 2,600 feet north of a river's edge and 2,050 feet outside of the port's entrance gate, met the situs requirement for coverage under the LHWCA. Id. at 139-41.

Two years later, the Court of Appeals for the Fifth Circuit, in Texports Stevedore Co., established a separate case-by-case inquiry that was to be applied in that jurisdiction when determining whether the situs requirement was met. 632 F.2d 504, 514. In doing so, the court stated:

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. . . . The site must have some nexus with the waterfront.

Id. The court further stated:

> We reject the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHW[C]A. Such a

> rule would introduce into the tests for coverage a new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime sites.

Id. at 513. Accordingly, the Texports Stevedore court held that a worker who was injured in a gear room some five blocks from the waterfront in a building which was located as near to the waterfront as feasible and whose operations were part of the ongoing overall loading process met the situs requirement for jurisdictional coverage under the Act. Id. at 515-16.

Most recently, the U.S. Court of Appeals for the Second Circuit cited with approval the approaches taken in Brady-Hamilton and Texports. Triguero v. Consolidated Rail Corp., 932 F.2d 95, 100-01 (2nd Cir. 1991). Specifically, the Triguero court held that the situs test was met where the claimant's injury occurred in a container yard separated from navigable waters by a public street and independent maritime facilities and located approximately one and one-quarter miles from the employer's dockside facility. Id. at 101. In so doing, while not delineating a specific situs test for its own use, the Second Circuit adopted a "functional" approach to the situs

requirement in which distance from a navigable waterway or separation from that waterway by roads or property boundaries is not dispositive. See id.

In the face of this precedent, the Court of Appeals for the Fourth Circuit in the instant case delineated yet another situs test distinct from those set forth in the Second, Fifth, and Ninth Circuits. As highlighted above, this test is highly restrictive and limits coverage under the Act within the Fourth Circuit to areas which physically touch the navigable waters of the United States. In so doing, the Court of Appeals specifically stated that "[i]f there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." 71 F.3d 1134, 1138-39 (App.A. at XVII-XVIII). In making this determination, the Court of Appeals specifically rejected the additional tests utilized by the Fifth and Ninth circuits when making identical determinations under the LHWCA.[4] Likewise, the Court of Appeals introduced a test which (1) develops a hard line approach in direct conflict with the

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[4] Note that the court did not address the Triguero decision.

language of the Fifth Circuit's decision in Texports Stevedore Co.; (2) seemingly focuses the inquiry on property divisions and fence lines in conflict with the approaches delineated by the Ninth, Fifth, and Second Circuits in Brady-Hamilton, Texports Stevedore Co., and Triguero, respectively; and (3) fails to account for any of the functional factors outlined by the Ninth Circuit in Brady-Hamilton. In so doing, the court illuminated the sharp contrast among the four circuits in the manner in which this element of jurisdictional coverage under the Act is interpreted and applied.

In light of this divergence across these circuits, the immediate case is quite appropriate for review by this Court. The LHWCA was enacted and amended to provide for uniformity of coverage to similarly situated workers' across differing federal circuits. As it stands, coverage under the Act's jurisdictional situs requirement is no longer determined by the locus of injury and its relationship to the navigable waterways of the United States, but instead by which judicial district has jurisdiction over that location. This potential for disparate results based upon factors foreign to the letter of the Act clearly calls for resolution of the issue by this Court without delay.

II. ***The decision of the Court of Appeals in this case is in direct conflict with prior decisions of other panels of the Court of Appeals for the Fourth Circuit***.

In addition to establishing a test in the immediate case which contrasts sharply with the applicable tests of other circuits on the same issue, the Court of Appeals' decision is decidedly in contravention of prior precedent within the Fourth Circuit.

The Court of Appeals for the Fourth Circuit had specifically addressed the situs requirement under the LHWCA on two prior occasions. The first was in Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), in which the court, while not purporting to establish a comprehensive test for situs coverage, held that two sites, a submarine shop 1,200 feet from the water's edge and a foundry 3,000 feet from the water's edge, satisfied the situs test because they were "integral parts of the shipyard." Id. at 169. The focus in that case was generally upon the nature of the work performed in the area in question with respect to the navigable waterways of the U.S., as opposed to the physical proximity of that area to the water.

Indeed, the foundry injury at issue in that case occurred approximately two and one-half blocks from the water's edge and was separated from the water by two public streets. See Jones v. Newport News Shipbuilding & Dry Dock Co., 5 BRBS 323, 324-25 (1977), aff'd Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (1978).

In the case of Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), the Fourth Circuit again addressed the situs issue, citing several factors which, in that case, militated against coverage of the Act. Those factors included (1) that the injury in question occurred well over a mile from the employer's terminal; (2) that the injury occurred along a public highway which did not connect any portions of employer's terminal or traverse continuous or contiguous terminal areas; (3) that, while the restaurant from which the claimant was traveling was arguably located in a waterfront area, it was separated from any navigable waterway or maritime terminal by a residential neighborhood; (4) that the restaurant from which the claimant was traveling was not the closest one to the terminal; and (5) that the restaurant was not an integral part of employer's terminal. Id. at 375. Again, as in Graham, the Humphries

court indicated that, while not "venturing to offer a touchstone for all future LHWCA jurisdictional questions, . . . ," the proper inquiry in a situs determination is on the character of the area in which the injury occurs. Id. at 374, 375. Further, the Humphries court stated that a situs "need not be . . . within any specified distance of navigable waters or a 'maritime' operation" to fall within the scope of the Act. See id. at 373.

In contrast to the "functional" focus seemingly established by this precedent, the Court of Appeals in the immediate case established that the determinative factor in a situs inquiry is whether the area in question actually touches navigable water and whether the area in question is separated from that water in any way, shape, or form. The significance of this alteration in light of its contrast with precedent both within and without the Fourth Circuit cannot be ignored. As such, these conflicts require proper redress by this Court.

This conclusion is especially pertinent in light of Judge Murnaghan's concurring opinion in the recent Fourth Circuit Court of Appeals panel decision in Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. February 9, 1996) (No. 94-2653). In that case, the court again

denied coverage under the LHWCA for lack of situs, based exclusively on the ruling in the immediate case that an injured worker is not covered where the locus of his injury does not actually touch the navigable waters of the United States. The court there held that the claimant at issue was not covered under the LHWCA where his injury occurred on a site not physically touching the water, located five miles from Norfolk International Terminal, and separated from the water by various small businesses and roads. Id. at 931-33. In his concurring opinion, Judge Murnaghan voiced his disagreement both with the restrictive holding of the Sidwell panel and with the resulting finding that Parker was not injured in an "adjoining area."

Judge Murnaghan initially stated his belief that the Sidwell court's "interpretation of the LHWCA's phrase 'other adjoining area' is entirely at odds with the meaning that Congress intended [courts] to ascribe to it." Id. at 935. In support of that conclusion, Judge Murnaghan cited the legislative history of the 1972 amendments to the Act, which expresses an unequivocal concern for the lack of uniformity in coverage under the pre-amendment Act. Id. at 14. In addition, Judge Murnaghan pointed to the policy of liberal construction embodied in the

Act in order to effectuate its remedial purposes, as enunciated in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977). In keeping with both this construction and the clear desire for broadened, yet uniform, situs coverage under the Act as amended, Judge Murnaghan intimated that a "functional" approach to situs coverage is preferable to the hard-line and restrictive approach enunciated in Sidwell. Parker, at 938-40. Indeed, he noted that, as highlighted herein, the Sidwell ruling runs directly contrary to rulings from various other federal circuits. Id. at 939. Further, Judge Murnaghan highlighted the fact that the Fourth Circuit had in fact employed such functional approaches in the past in cases such as Humphries, 834 F.2d 372, and Graham, 573 F.2d 167. Specifically, he cited Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation' for it to be within the LHWCA's scope." Parker, at 938 (citing Humphries, 834 F.2d at 373).

Finally, even aside from his concern with the conflict the Sidwell test creates with other circuits and with prior Fourth Circuit precedent, Judge Murnaghan pointed to the specific language utilized in the Act as

amended. He noted that "adjoining" means "touching or bounding" or being "near in space." Id. at 939 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 27 (1981)). In light of this definition, he stated:

> Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, . . . we should hold that the phrase 'other adjoining area' does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA. To hold otherwise not only violates our duty to accord the statute a broad interpretation, but also fundamentally conflicts with the approach we took in Humphries.

Id. (internal citation omitted). In essence, Judge Murnaghan concluded that an unduly restrictive interpretation of the situs requirement would ultimately subject claimants to the very "harsh" and "incongruous" results which prompted Congress to amend the situs requirement in the first place. Id. at 940 (citing Northeast Marine Terminal Co., Inc. v.

Caputo, 432 U.S. 249, 268 (1977)).[5]

The above conflict again serves to illuminate the divergence and lack of uniformity which currently accompanies the situs test under the LHWCA. Indeed, the split within the very circuit which pronounced the restrictive test at issue in this case, both in case law and judicial opinion, demonstrates the need for binding interpretation by this Court.

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[5] Refer as well to the concurring opinion of Judge Beaty in Sidwell. 71 F.3d 1134, 1142 (App.A. at XXX). Judge Beaty position essentially mirrors the sentiments pronounced by Judge Murnaghan in Parker. Specifically, as Judge Murnaghan did in Parker, Judge Beaty disagreed with the delineation of a restrictive situs test which limits coverage under the Act to areas which actually touch the navigable waterways. 71 F.3d at 1143 (App.A. at XXX-XXXIII). Further, Judge Beaty stated that a functional approach such as that utilized in Brady-Hamilton could provide an appropriate and uniform framework for the situs inquiry without being unduly restrictive in the fashion chosen by the majority. Id.

III. ***The decision of the Court of Appeals in this case involves the important federal question of what constitutes a covered situs under the Longshore Act, which has not been, but should be, decided by this Court.***

This Court has in past years addressed issues which relate in part to the situs issue presented in this case. For example, in Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 324 n.32 (1983), this Court held that the requirements of "status" and "situs" are distinct. In addition, this Court held in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985), that neither requirement should be read to render the other superfluous. Finally, in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), this Court confronted the issues of whether two claimants met the jurisdictional status and situs requirements under the Longshore Act. In addressing these concepts, the Court initially noted that the LHWCA should be liberally construed in conformance with its remedial purposes in a way which avoids harsh and incongruous results. Id. at 268. The Court then entertained a detailed discussion of the status requirement under the Act.

However, with respect to situs, the Court merely held that the locus of the claimants' injuries met the situs requirement as the facilities on which the injuries occurred were immediately adjacent to and physically touched navigable waterways. Id. at 279-81. However, the Court in no way addressed the issue of whether or not additional areas further removed from such a waterway would meet the situs requirement.[6]

Thus, the Court has never specifically addressed what test or factors should be utilized in determining whether the location of an individual's injury meets the situs requirement under the LHWCA. More definitively, the Court has never given any guidance as to what constitutes an "adjoining area" within the intent and scope of Section 903(a) of the Act. As a result, there is currently disparity in coverage under the Act because of the differing tests and factors outlined above.

There can be no doubt that, where a federal act such as the LHWCA evinces a clear legislative intent to provide for uniformity in application, and where the application that actually results across the various federal circuits is anything but uniform, the lack of

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[6] See supra n.3.

uniformity must be remedied. As this case presents the particular issue upon which the divergence outlined above is predicated, this case affords the Court the attractive opportunity to bring clarity to the law under the LHWCA and guidance to those who serve to uphold the tenants of that Act.

IV. *The decision of the Court of Appeals in this case is erroneous and is likely, given the significant volume of longshoring, shipbuilding, and commercial shipping activity which occurs within the Fourth Circuit, to have broad detrimental effects which will undermine the very purposes of the Longshore Act.*

The Fourth Circuit encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Of primary note within that geographic area is the Hampton Roads region in southeastern Virginia. This area includes Newport News Shipbuilding and Dry Dock Co., one of the nation's largest shipbuilding and ship repair facilities for both private and United States Navy vessels. The facility physically covers approximately 550 acres and

contains the largest dry dock in the Western Hemisphere. The Port of Greater Hampton Roads Annual 1995, at 113-14 (1995). In addition, the facility currently employs nearly 20,000 employees involved in various facets of the shipbuilding and ship repair processes. Id. at 119. The shipyard itself has expanded over the course of the past several decades to the point that portions of the yard are separated by public streets not controlled or owned by the shipyard. Likewise, shipbuilding and ship-repair tasks often take place in areas not in direct contact with the property boundaries of the shipyard. The reason for this separation is again economic expansion of the shipbuilding and repair enterprises and the scarcity of waterfront land upon which such activities can be performed. At the same time, the various functions performed on these off-terminal cites are integral to the shipbuilding, ship repair, loading, and unloading activities which are the essence of the shipyard's business.

In addition to Newport News Shipbuilding, the Hampton Roads area is the location of numerous additional shipbuilding, ship repair, longshoring, and commercial cargo enterprises. Specifically, the area serves as the location for thirteen large shipbuilding and ship repair facilities; six international marine

container terminals; seven merchandise terminals; three coal terminals; one grain handling facility; and fifteen oil storage and handling facilities. Id. at 34-60.

Indeed, statistics show that, in 1993, more foreign water-borne commerce was exported through Hampton Roads than any other city on the East Coast. Id. at 5. Likewise, Hampton Roads ranked third in this category overall in the entire United States. Id. Further, in 1993, Hampton Roads handled over 53 million short tons of cargo and received over 2,500 vessel calls from vessels representing more than 80% of the world's leading shipping lines. Id. Finally, Hampton Roads is the largest coal port in the world. Id. at 124.

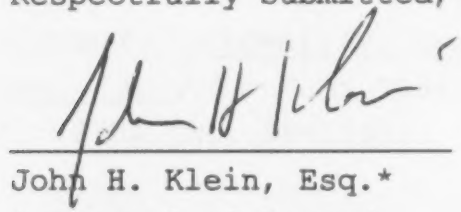
What the above facts demonstrate is that the propriety of the Court of Appeals decision limiting coverage under the Longshore Act through its restrictive application of the situs test is of particular importance because of the substantial maritime activity which occurs in the Fourth Circuit geographic area. Clearly, where the propriety of that decision is questionable in light of the divergent interpretations and applications of the situs requirement in other jurisdictions and within the Fourth Circuit itself, the need for a proper and appropriate resolution of the issue by this Court is indisputable.

CONCLUSION

In the immediate case, the Fourth Circuit Court of Appeals delineated a hard and fast rule which limits coverage under the LHWCA to individuals who are injured on property which physically touches the navigable waters of the United States. This limitation was made in contravention of significant precedent from three other federal circuits, and from the Fourth Circuit itself, which mandates various "functional" approaches to the situs inquiry under the LHWCA. The limitation appears also to conflict with the letter and spirit of the situs provision and with the judicial policy of broad interpretation of the situs requirement under the Act. In addition, when applied, the test is likely to both significantly limit coverage under the Act and to perpetuate disparate treatment of similarly-situated, similarly-employed maritime workers depending upon the physical location of their injuries.

In light of these notable disparities, and in the face of the policy of uniform application embodied in the LHWCA, Petitioner submits that this Court should exercise its power of discretionary review and provide for uniformity of coverage in keeping with the purposes of the LHWCA.

Respectfully Submitted,



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APPENDIX

APPENDIX A

Decision of the United States Court of Appeals for the Fourth Circuit: Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101

Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,

Respondent.

On Petition for Review of an Order of the Benefits Review Board. (92-1720)

Argued: September 25, 1995

Decided: December 28, 1995

Before WIDENER and LUTTIG, Circuit Judges, and BEATY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Luttig wrote the opinion, in which Judge Widener joined. Judge Beaty wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: John Harlow Klein, RUTTER & MONTAGNA, Norfolk, Virginia, for Petitioner. Joshua Thomas Gillelan, II, Senior Attorney, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Intervenor. F. Nash Bilisoly, IV, VANDEVENTER, BLACK, MEREDITH & MARTIN, Norfolk, Virginia, for Respondent. ON BRIEF: Thomas S. Williamson, Jr., Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Intervenor.

OPINION

LUTTIG, Circuit Judge:

Appellant Christopher S. Sidwell was injured at a site eight-tenths of a mile from a ship terminal, while repairing a shipping

container. He sought compensation under the Longshore and Harbor Workers' Compensation Act. The ALJ denied Sidwell benefits, finding that the injury did not occur at a situs covered by the Act, and the Department of Labor Benefits Review Board affirmed. We affirm.

I.

Sidwell was injured on June 11, 1990, while working for his employer, Express Container Services ("ECS"), as a container mechanic at ECS's Chautauqua facility in Portsmouth, Virginia. ECS is in the business of repairing cargo containers and the chassis used to carry them. ECS voluntarily paid Sidwell temporary total disability benefits under the Virginia Workers' Compensation Act from June 12, 1990, through September 14, 1990, as well as medical benefits. J.A. at 78. Sidwell sought additional compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA").

ECS's facility was previously located near the gate of Portsmouth Marine Terminals, where vessels are loaded and unloaded from the Elizabeth River. In 1985, the terminal expanded and purchased ECS'S facility, at

which time ECS relocated to its present facility eight-tenths of a mile from the terminal. The current location is surrounded by various businesses and residential developments, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. J.A. at 79.

ECS contracts directly with steamship lines and does not have any agreement with the terminal itself or with the Virginia Port Authority. Approximately 90% of the containers and chassis arrive at ECS via inland roads, while the remainder come from the terminal. ECS also performs minor repairs on containers at the terminal site, using mobile trucks. Employees do not ordinarily alternate between the terminal and Chautauqua sites. Sidwell, for example, worked at the Chautauqua site and had not worked at the terminal for over a year prior to his injury at Chautauqua. J.A. at 24-25.

The ALJ denied Sidwell benefits under the

LHWCA because he found that the Chautauqua site was not an "adjoining area" under the "functional relationship" test of *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978). The Benefits Review Board affirmed in an unpublished *per curiam* opinion, and this appeal followed.[1]

II.

Before 1972, coverage under the LHWCA "was determined primarily by the traditional 'locality' test of maritime tort jurisdiction." *See generally Humphries v. Director, OWCP*, 834 F.2d 372, 373 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). Under this test, workers injured on navigable waters were covered under the LHWCA, while those injured on adjoining land, piers, or

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[1] The Clerk of this court originally denominated the Director of the Office of Workers' Compensation of the United States Department of Labor as an additional respondent but, in light of *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), and under our circuit precedent in *I.T.O. Corp. v. Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (*en banc*) (*per curiam*), we dismissed the Director as a party because she was not a real party in interest. We did, however, exercise our discretion to permit the Director to intervene on behalf of the claimant (for whom she was already arguing in her brief).

wharves were covered only by state workmen's compensation laws. *Id.* As a consequence, longshoremen continually walked in and out of LHWCA coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels. S. Rep. 92-1125, 92d Cong., 2d Sess. 12-13 (1972).

In 1972, Congress addressed this problem of alternating coverage by amending the LHWCA so as to expand coverage to both navigable waters and "the adjoining land area." *Id.* at 13. In doing so, Congress legislated a "status" requirement and a "situs" requirement, both of which must be satisfied in order for the Board to have jurisdiction to award benefits. The status requirement limits coverage to

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker . . . .

33 U.S.C. § 902(3). The situs requirement limits coverage to

> [any] injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

33 U.S.C. § 903(a) (emphasis added).

The ALJ and the Board each found that in this case the situs test was not met, and Sidwell challenges that determination.

A.

The Supreme Court has not articulated a test for determining what is an "other adjoining area" under the LHWCA.[2] The Court has explained, however, that the requirements of "status" and "situs" are distinct, *Director, OWCP v. Perini North River Assocs.*,

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[2] The Court held in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 279-81 (1977), that a terminal that entirely adjoined the water was a covered situs, but a terminal is a situs expressly enumerated in the statute.

459 U.S. 297, 324 n.32 (1983) ("[T]he status requirement is occupational and the situs test is geographic."), and that neither should be read to render the other superfluous, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) ("[T]o classify [claimant's] employment as maritime because he was on a covered situs or in a 'maritime environment' would blur together requirements Congress intended to be distinct. We cannot thus read the status requirement out of the statute."); *see also P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 79 (1979) ("By understanding the term 'maritime employment' to embody an occupational rather than a geographic concept, we give the two phrases [status and situs] distinct and consistent meanings.").

The courts of appeals have developed essentially three different tests for determining whether an injury occurred on a covered situs. The three tests all begin from the premise that the statute does not really mean what it says, namely, that the injury must occur on navigable waters, at an enumerated adjoining location, or at another situs that actually "adjoins" navigable waters and is customarily used in loading, unloading, repairing, dismantling, or building vessels.

The Ninth Circuit in *Brady-Hamilton* reasoned that "the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity," 568 F.2d at 141. Under this test, whether an area adjoins navigable waters requires an examination of at least four factors, none of which necessarily even relates to whether the area is, in the words of the statute, "adjoining navigable waters." These factors, "among others," are,

> [1] the particular suitability of the site for the maritime uses referred to in the statute; [2] whether adjoining properties are devoted primarily to uses in maritime commerce; [3] the proximity of the site to the waterway; and [4] whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. In *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629 (3d Cir. 1976), a decision the Supreme Court has criticized as appearing to "essentially discard[] the situs test," *Northeast Marine*, 432 U.S. at 277 n.40, the Third Circuit held that "[a]s long as the

employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available[, because] [r]esuscitating the situs requirement in cases satisfying the status test [would] interfere with Congress' intention to eliminate the phenomenon of shifting coverage."[3] 540 F.2d at 638. And in *Texports*

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[3] *See also Sea-Land*, 540 F.2d at 636, 638:

> The line delimiting the outer reaches of the Act's extended coverage is, we think, functional and not spatial. . . . It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of injury, that in our view Congress referred to by its reference to navigable waters. . . . The limits of federal coverage is [sic] defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air[,] land and the water modes of transportation. If that interface is customarily located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal," a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking,

Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the Fifth Circuit *en banc* likewise effectively eliminated the situs requirement in favor of a case-by-case, "broad and nebulous" inquiry, *id.* at 518 (Tjoflat, J., dissenting), that affords coverage as long as there is "some nexus with the waterfront":

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.

632 F.2d at 514.

Our circuit has considered the issue twice. In *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert.*

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railroading or warehousing.

denied, 439 U.S. 979 (1978), we held in a one-paragraph discussion, "without purporting to offer a comprehensive test," *see Humphries*, 834 F.2d at 374, that two sites, a submarine shop and a foundry, 1200 feet and 3000 feet from the water's edge respectively, satisfied the situs test because they were both "integral parts of the shipyard." *Graham*, 573 F.2d at 169.

Then, in *Humphries*, we held that the situs requirement was not met when a ship foreman was injured in a car accident one and half miles from the terminal as he was bringing food for his workers back from a restaurant. In that case, we considered each of the three above-described tests. We rejected *Sea-Land* as "unacceptable" because it "effectively reads the explicit situs requirement out of the Act." 834 F.2d at 374. We characterized *Texports* as "an opinion which struggled bravely with the issue, [and] ended up with little more than a litany of factors which are *not* conclusive in a situs determination -- absolute contiguity with navigable waters, fence lines, local designations of the area, exclusive use for maritime purposes, and so on." *Id.* We noted that *Brady-Hamilton* "at first glance at least seem[ed] a more practical approach" than the

other tests advanced. *Id.* But ultimately we did not even decide the case under *Brady-Hamilton*. Instead, we expressly declined to "ventur[e] . . . a touchstone for all future LHWCA jurisdictional questions" and simply recited a number of factors which, in "combination," rendered the accident outside a maritime situs. *Id.* at 375.

It is against this backdrop that we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied.

B.

Sidwell argues that we should adopt the expansive approach of *Texports*, the Director urges us to embrace what is in effect (although she does not admit it) the even broader formulation of *Sea-Land*,[4] and ECS

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[4] The Director, for example, argues that maritime use should be a "strong" indication of situs, and that the "'primary' use of surrounding properties and . . . the *intervention* of a residential area between the situs of injury and the nearby navigable waters . . . *should be incapable as a matter of law of overcoming the fact that a site near the water is used for integrally maritime purposes*." Br. for the Director, OWCP at 29, 43 (second emphasis added).

defends the propriety of the *Brady-Hamilton* multi-factored "functional" test, which the Board applied in this case. Because none of these proffered tests even purports to follow the language of the statute -- indeed, for the most part they all openly disavow the statutory text -- we decline to adopt any of these tests.

As federal courts, we have repeatedly pledged to Congress that if it would speak clearly in its enacted legislation, we in turn would give effect to that clearly stated intent. In section 903(a), Congress has fulfilled that obligation, just as Justice Kennedy observed it had in section 33(g) of this same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 484 (1992) ("Often we have urged the Congress to speak with greater clarity, and in this statute [the LHWCA] it has done so.").[5] Therefore, faithful

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[5] In *Cowart*, the question was whether the claimant, at the time of his third-party settlement, was "a person entitled to compensation" under section 33(g) of the LHWCA, 33 U.S.C. § 933(g), which provides in relevant part that "a person entitled to compensation" forfeits all future benefits if he settles a third party claim without the written approval of his employer. The Court held that, under the plain meaning of "entitlement," a person is entitled to compensation "at the moment his

to our promise, we will interpret the statute as it is written, and as we have been instructed by the Supreme Court to do with respect to this very Act. *See id.*

The plain language of the LHWCA requires that covered situses actually "adjoin" navigable waters, not, as the Director maintains, that they merely be in "the general geographic proximity" of the waterfront. *See* Br. of Director, OWCP at 47.[6] Because Congress

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right to recovery vest[s]," even though he has not yet received compensation payments from the employer and has not yet received a judgment in his favor. 505 U.S. at 477. If anything, the meaning of the word "adjoining" is even clearer than the meaning of the word "entitlement," and so Justice Kennedy's observation in *Cowart* applies with at least the same force in the context of section 903(a), which we interpret today:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.

Id. at 475.

[6] That the entire litany ("pier, wharf," etc.) is found in a statutory parenthetical defining "navigable waters" as "including" these areas is further support for interpreting the phrase "other adjoining area[s]" so

did not specify a more technical definition of the word "adjoining" (if that is even possible), we must accord that word its ordinary meaning, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989), as, incidentally, the legislative history confirms Congress intended, *see* S. Rep. 92-1125, 92d Cong., 2d Sess. 2 (1972) (emphasis added) ("The bill also expands the coverage of this Act to cover injuries occurring in the *contiguous* dock area related to longshore and ship repair work."). To be sure, dictionaries do include "neighboring" and "in the vicinity of" as possible definitions of "adjoining,"[7]

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as to require an immediate geographical nexus with navigable waters.

[7] The Fifth Circuit in *Texports* relied upon these secondary definitions in order to avoid what it believed to be the unacceptable consequences of a plain meaning interpretation of the statute:

> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near." "Adjoining" can mean "neighboring." . . . So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHW[C]A.

but such is not the ordinary meaning of the word; rather, the ordinary meaning of "adjoin" is "to lie next to," to "be in contact with," to "abut upon," or to be "touching or bounding at some point," *see* WEBSTER'S THIRD NEW INT'L DICTIONARY 27 (1993); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 424 (2d ed. 1975) ("'Adjoin' presumably means something like 'border on' or "have direct access to' navigable waters . . . ."). Accordingly, we hold that an area is "adjoining" navigable waters only if it "adjoins" navigable waters, that is, if it is "contiguous with" or otherwise "touches" such waters.[8] If there are other areas between the

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> To require absolute contiguity would be to reenact the hard lines that caused longshoremen to move continually in and out of coverage. It would frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity.

632 F.2d at 514-15.

[8] Sidwell argues that whether terminal expansion has forced relocation from a site directly adjoining navigable waters to one that does not adjoin such waters (but is the closest feasible), is relevant to whether a particular site adjoins navigable waters. We disagree. The exigency of even a forced relocation cannot transform a site distant from navigable waters into one

navigable waters and the area in question, the latter area simply is not "adjoining" the waters under any reasonable definition of that term.

Doubtless realizing that the common-sense definition of "adjoining" is as we have interpreted it, Sidwell and the Director argue, relying on *Texports*, 632 F.2d at 515, that the word "area" is sufficiently broad that the phrase "adjoining area" still covers the site where Sidwell's injury occurred. For example, the Director asserts it is "entirely reasonable" to consider the whole city of

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that somehow "adjoins" those waters. The site either adjoins navigable waters or it does not, and, as the Supreme court has instructed, that is a geographical inquiry.

The same must be said with respect to the fact that ECS had mobile trucks which went to the terminal to perform minor repairs on-site. That an employer sends some workers to the waterfront -- or even that an employer has a separate site altogether that is "adjoining" navigable waters -- is not germane to the question of whether an injury occurred at a covered situs. The statute is expressly limited to the place where the "injury occurr[ed]"; an employer's other activities or locations are irrelevant to the geographic inquiry of whether the injury occurred at a covered situs.

Norfolk or Portsmouth to be an "other adjoining area" to navigable waters. Br. for the Director, OWCP at 46. She presumably would be forced to agree as well, at least in principle, that the entire Commonwealth of Virginia is also an "area" adjoining navigable waters.

If we were required to define "area" in the abstract, we might well have to accept the Director's position, because it is indeed true in some sense that every location imaginable is within a larger area that ultimately adjoins some navigable waters. But the word "area" does not appear in the statute in isolation; rather, it is preceded by the words "other adjoining." The statute specifies that coverage extends to injuries sustained on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area* . . . ." To define "area" without reference to this language of qualification, is to ignore the definitional limits that inhere in the statute itself.

The use of the word "other" following the enumerated adjoining areas confirms that the scope and nature of the "other adjoining area[s]" are to be defined by reference to the enumerated areas; in other words, the

additional unenumerated covered areas are to be understood as of the same type as those enumerated. Even if the statute had not used the word "other," we would, under the familiar canon of statutory interpretation *noscitur a sociis*, still look to the enumerated items in the series to determine which other "adjoining areas" would satisfy the situs requirement. *See Beecham v. United States*, 114 S. Ct. 1669, 1671 (1994); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990).

Thus, an "other adjoining area" as to which coverage extends must be *like* a "pier," "wharf," "dry dock," "terminal," "building way," or "marine railway."[9] Each of these enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shoreside structure or facility. And the asserted "area" must be "customarily

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[9] The only term of these that is perhaps not within the common knowledge is "building way," which is a technical term that means "an inclined structure usually of timber upon which a ship is built or upon which a ship is supported in launching." WEBSTER'S THIRD NEW INT'L DICTIONARY 2587 (1993).

used by an employer in loading, unloading, repairing, dismantling, or building a vessel," as the statute provides.[10] Moreover, although one might be tempted initially to eschew any reliance on conventional property lines in defining "other adjoining area[s]," we believe that it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single "other adjoining area."[11] Indeed, it is for this

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[10] Both the court in *Sea-Land* and the Director rely upon this statutory language following "other adjoining area" to contend that the customary use of an area should be determinative of the situs inquiry. This language, however, is a *further* restriction upon "other adjoining areas" -- implying that there are areas adjoining navigable waters that nonetheless do not meet the situs requirement because they are not customarily so used -- not an implicit elimination of the requirement that the area first be adjoining navigable waters. In any event, reading the language in the manner proposed by the Director collapses the separate status and situs requirements into a single inquiry into status, in contravention of the Supreme Court's injunctions in *Herb's Welding*, 470 U.S. at 426, and *P.C Pfeiffer Co.*, 444 U.S. at 79, that we not read the status and situs requirements as one and the same.

[11] In this regard, of course, it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured. As the Fifth Circuit explained in

reason that conglomerations of multiple properties, like the entire Commonwealth of Virginia, are not single "areas" under the

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Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) (distinguished in *Texports*):

> [The back lot upon which a crane was located by which claimant was injured was somewhere] from 150 to 2,000 feet from the water's edge. In any event the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding.

And as the Director has concluded:

> [I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety; it is not necessary that the precise location of an injury be used for loading or unloading operations (whatever may be the proper scope of "loading or unloading") . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

LHWCA Program Memorandum No. 58 at 10-11 (1977) (footnote omitted).

terms of the statute.

This definition, unlike any of those fashioned by our sister circuits, gives full effect to the statute's language, yielding to the maximum extent possible the "clear geographical boundary" that the Court has explicitly recognized that Congress intended:

> *[The] statute draws a clear geographical boundary* that will predictably result in workers moving in and out of coverage. . . . [T]here will always be a boundary to coverage, and there will always be people who cross it during their employment.

Herb's Welding, 470 U.S. at 427, 426 (emphasis added).

At the same time, without extending coverage to "all those who breathe salt air," *id.* at 423, this interpretation achieves the "broad" remedial purposes for which the legislation was enacted, *see P.C Pfeiffer Co[.]*, 444 U.S. at 74, 78. The LHWCA was enacted to address a specific problem, and the actual language that Congress chose does just that. The problem, as we have explained, was

that longshoreman loading and unloading ships walked in and out of LHWCA coverage as they walked the gangplank from ship to shore. In response, Congress extended coverage to both navigable waters *and* "the adjoining land area," S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972), so that the longshoremen at both ends of the gangplank would be covered equally by the LHWCA. As the Supreme Court has repeatedly stated, "Congress intended that a worker's eligibility for federal benefits would not depend upon whether he was injured while walking down a gangway or while taking his first step onto the land," *P.C. Pfeiffer*, 444 U.S. at 75; rather, coverage would extend to "the waterfront areas where the overall loading and unloading process occurs." *Northeast Marine*, 432 U.S. at 272; *see also Herb's Welding*, 470 U.S. at 423 (explaining that Congress expanded coverage to include "rather large *shoreside* areas" (emphasis added)). The definition we adopt today ensures coverage for all maritime employees injured in the waterfront areas where the loading, unloading, and repair of vessels occurs, as Congress plainly intended and as the Supreme Court has directed.

In interpreting the act as we do, we realize that if Congress were confronted today

with further amendments to the statute, it conceivably might choose to cover areas in the "general proximity" or in the "neighborhood of" or "functionally related" to navigable waters. But we have no authority to concern ourselves with this possibility. There is no question at all that *in 1972* Congress was concerned only with areas immediately at waterside, where the loading and unloading of ships occurs, not with facilities separated and at some distance from the navigable waters. And here, no less so than in *Cowart*,

> [i]t is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. . . . It is Congress that has the authority to change the statute, not the courts.

505 U.S. at 483-84.

With the understanding of the express language and the purpose of the statute described above, it is evident that ECS is not an "other adjoining area" within the meaning

of the LHWCA.[12] While the ECS facility is arguably an "area" within the terms of the statute, it is not an area "adjoining" navigable waters. And, while the expanse of property between the navigable waters and ECS (together with structures and facilities that occupy that property) is, in some sense, "adjoining" navigable waters, it is not an "area" within the meaning of the statute. Accordingly, Sidwell was not injured on a covered situs under the LHWCA.

III.

This is not a case in which ultimately the Director's interpretation of the statute is deserving of deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The

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[12] ECS also fails the *Brady-Hamilton* test and even a "totality of the circumstances" test. The ALJ expressly found that "there are no outstanding characteristics of the site that make it especially suitable for maritime use," the adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8/10 of a mile from the site, and the water is even farther. J.A. at 76. Therefore, even if we had declined to read the statute as it is written, and had instead adopted the *Brady-Hamilton* test or simply looked to the totality of the circumstances, we would still have affirmed the Board.

Director argues, in particular, that we should defer to OWCP's interpretation of the LHWCA as contained in "LHWCA Program Memorandum No. 58," an internal memorandum prepared in 1977 entitled "Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act," which purports to "reflect OWCP's position" on the Act's coverage. This memorandum discusses situs in only slightly over a page of double-spaced text, none of which analyzes the statute, attempts to define a general rule or test for what constitutes an "other adjoining area," or otherwise purports to "interpret" the Act. *See id.* at 10-11. Essentially all it does is describe the factual circumstance of *Texports*, where the Act was held to apply, and state that coverage "should" extend to that circumstance. *Id.* at 11.

We are not certain that this brief passage from the 1977 internal memorandum even constitutes an actual agency interpretation of the LHWCA;[13] even if it were such an

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[13] Our uncertainty is prompted both by the opacity of the language in the Memorandum and by the notable absence of language purporting to establish any interpretive rule. Additionally, the fact that the arguments made by the Director in her brief extend

interpretation, it certainly would be entitled to less deference than a formal agency interpretation.[14] We are not certain in any event that the 1977 Memorandum contradicts our interpretation of the statute; while the memorandum arguably embraces at least the outcome of *Texports*, it also notes, in describing the purposes of the Act, that "[the

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beyond any arguments that would be supported by the Memorandum suggests that the Memorandum alone does not clearly support her position. Of course, no deference is owed her "interpretations" that are advanced only in the context of this litigation. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.").

[14] As the Court explained in *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (citations omitted) (emphasis added),

> [an agency] regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules and the publication of *agency enforcement guidelines. Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers*, these informal interpretations are still entitled to some weight on judicial review.

1972 Amendments] exten[ded] . . . the Act's geographical coverage to the *waterfront facilities* at which such workers are employed . . . ." *Id.* at 5 (emphasis added). Assuming, however, that the 1977 Memorandum is a formal, official agency interpretation and assuming further that that interpretation is implicitly that adopted in *Texports*, that interpretation is not a reasonable interpretation of the statute. For *Texports*, as the Director acknowledges in the Memorandum, extends coverage to sites that concededly do not adjoin navigable waters, *id.* at 11, contrary to the plain language of the Act. Indeed, the only limitation to coverage that the Director is willing to acknowledge in her briefs is that a location 1000 miles from navigable waters cannot be considered to adjoin those waters. *See* Br. for the Director, OWCP at 42. And in reality, the interpretation she urges would not recognize even this modest limitation. As her counsel conceded at argument, under the Director's interpretation even an injury in Kansas City, Kansas, would be covered under the Longshore and Harbor Workers[']' Compensation Act as an injury occurring on an area adjoining navigable waters. If we, as courts, are required to yield to such an interpretation, then we have little to no role to play in the

interpretation of federal statutes.

For the reasons stated, the judgment of the Board is affirmed.

AFFIRMED

BEATY, District Judge, concurring:

I concur only in the results reached by the majority opinion in affirming the decision of the Administrative Law Judge (ALJ). The ALJ correctly applied the *Brady-Hamilton* test which was cited with approval in *Humphries*. This test provides a sufficient mechanism to resolve, on a case by case basis, situs issues raised by 33 U.S.C. § 903(a) as a part of the Longshore and Harbor Workers' Compensation Act (LHWCA). The facts of the present case do not justify abandoning *Brady-Hamilton*, and creating a more restrictive interpretation of the situs test so as to preclude coverage for injuries sustained by maritime employees.

As indicated by footnote 12 of the majority opinion, the ALJ correctly applied the factors of *Brady-Hamilton* and "expressly found that 'there are no outstanding characteristics of the site that make it especially suitable for maritime use,' the

adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8/10 of a mile f~ m the site, and the water is even farther." The majority opinion further acknowledges that application of the *Brady-Hamilton* test was enough to deny coverage for failure to comply with the situs requirement.

With the expansion of terminal operations shrinking the available sites that actually touch navigable waters, as well as the development of technology that will increasingly push maritime work ashore, the *Brady-Hamilton* test provides an appropriate guidepost to determine whether the situs requirement has been met. Application of the test also makes it possible to draw a boundary line to coverage without being unnecessarily restrictive.

The majority, however, now favors creation of a more literal interpretation which will serve to exclude coverage, if the site in question does not actually touch navigable waters. This new test is crafted by defining "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" as merely an

extension of the enumerated sites which actually touch navigable waters. Such an interpretation would render the additional proviso superfluous. Congress by use of the phrase "or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" provided a description of additional areas that would satisfy the situs test without requiring these additional sites to actually touch navigable waters. If Congress intended to further limit coverage, there would have been no need to describe additional covered sites beyond those already enumerated in the statute.

In appropriate circumstances, consistent with *Brady-Hamilton*, an injury to a maritime employee on an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" could be covered, even where the site did not actually touch navigable waters. However, based upon the facts of the present case, the ALJ's decision was a correct application of the *Brady-Hamilton* test which should not be abandoned by this Court. Simply put, the situs requirement was not met in this case, and covered [sic] should be denied to Sidwell. I concur in the results only to the extent that the decision of the Administrative Law

Judge should be affirmed.

APPENDIX B

Decision of the Benefits Review Board, Unites States Department of Labor, dated December 29, 1994: Sidwell v. Express Container Services, Inc., BRB No. 92-1720 (1994).

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB No. 92-1720

NOT PUBLISHED

CHRISTOPHER S. SIDWELL	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
EXPRESS CONTAINER	)	DEC. 29, 1994
SERVICES, INCORPORATED	)	
Self-Insured	)	
Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk Virginia, for claimant.

Thomas J. Duff and F. Nash Bilisoly (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-0242) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant sustained an injury on June 11, 1990, while working for employer as a container mechanic at its Chautauqua facility in Portsmouth, Virginia. Claimant worked for employer in this capacity for 14 years. Employer is in the business of repairing cargo

containers and the chassis used to carry them. Employer voluntarily paid claimant temporary total disability benefits under the Virginia Workers' Compensation Act from June 12, 1990, through September 14, 1990, as well as medical benefits. Claimant sought compensation under the Longshore Act.

Employer's facility was previously located on Hill Avenue, next to the gate of Portsmouth Marine Terminals, in Portsmouth, Virginia, where vessels are loaded and unloaded from the Elizabeth River. In 1985, however, the Virginia Port Authority expanded the terminal and purchased employer's Hill Street location. At that time, employer relocated to its present Chautauqua Avenue location, eight-tenths of a mile from the terminal. The new location is surrounded by various businesses, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. The new site is located in an area zoned M-2, heavy industrial.

Employer's president, Wayne Matthews, testified that his company contracts directly with steamship lines and does not have any agreement with the terminal itself or with the Virginia Port Authority. He related that approximately 90 percent of the containers and chassis arrived at the site via inland roads, while the remainder come directly from the terminal. Once the equipment is checked and repaired, employer notifies the steamship company and a carrier picks it up. Employer also performs minor repairs at the terminal site using mobile trucks.[1] Employees do not normally alternate between the terminal and Chautauqua sites; claimant worked at the latter location. Until the beginning of 1990 shipside work at the terminal was available on weekends to all mechanics as overtime on a rotating basis; subsequently, however, overtime work is available to mechanics at their usual place of work.

The administrative law judge found that claimant met the status test of Section 2(3) of the Act, 33 U.S.C. § 902(3), since maintenance and repair is essential to the

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[1] Minor repairs were identified as those under $300, involving changing a tire, fixing a light or repairing a mud flap. Tr. at 35.

continued use of containers in longshoring operations. The administrative law judge determined, however, that the situs requirement of Section 3(a) of the Act, 33 U.S.C. § 903(a), had not been met, reasoning that employer's Chautauqua site did not qualify as an "adjoining area" under the "functional relationship" test set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

On appeal, claimant argues that the administrative law judge erred in finding that his injury did not occur on a covered maritime situs. Claimant asserts that the Act must be liberally construed and that the 1972 Amendments indicate that an expansive view of coverage should be taken. Employer responds, urging that the administrative law judge's finding that the Chautauqua facility is not a covered situs be affirmed. In the alternative, employer argues that claimant did not meet the status test, as the vast majority of container and chassis repair performed by employer is done in anticipation of land rather than maritime transportation.

To be covered under the Act, claimant must satisfy both the "status" requirement of Section 2(3) and the "situs" requirement of

Section 3(a). *See P.C Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 74, 11 BRBS 320, 322 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264, 6 BRBS 150, 159 (1977). The status inquiry under Section 2(3) involves an analysis of the employee's overall employment duties. *Id.* The situs requirement of Section 3(a) covers employees injured in specified locations.

Section 3(a) provides coverage for disability resulting from "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C § 903(a) (1988). An injury not occurring on one of the enumerated locations is covered under the Act only if the location of the injury is an "adjoining area" under Section 3(a). *See Herron*, 568 F.2d at 140, 7 BRBS at 411; *Felt v. San Pedro Tomco*, 25 BRBS 362 (1962) (Stage, C.J., concurring and dissenting). Claimant contends on appeal in this case that employer's Chautauqua facility was an "adjoining area," arguing that the United States Supreme Court has held that the Act must be liberally construed in favor of

the injured employee. Claimant further asserts that the various courts of appeals which have considered this issue have held that situs includes far more than those locations along the water's edge.

Initially, claimant asserts that the administrative law judge erred in analyzing whether employer's Chautauqua location is an "adjoining area" under the "functional relationship" test set forth in *Herron*, 568 F.2d at 139, 7 BRBS at 411. Claimant contends that this issue should have been analyzed under the decision of the United States Court of Appeals for the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), *aff'g on recon. en banc*, 554 F.2d 245, 6 BRBS 265 (5th Cir. 1977). We do not agree that *Winchester* necessarily leads to a different result than the test set forth in *Herron*. Both cases recognize that situs does not turn on physical contiguity to water but is defined by function. The "area" must be one "customarily used by an employer in loading, unloading, ..." 33 U.S.C. § 903(a). In *Humphries v. Director*, OWCP, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.[]Ct. 1585 (1988), moreover, the United States Court of Appeals for the Fourth

Circuit, within whose appellate jurisdiction this case arises, discussed both *Winchester* and *Herron*. The court characterized the Fifth Circuit's decision in *Winchester* as "an opinion which struggled bravely with the issue, [but] ended up with little more than a litany of factors which are not conclusive in a situs determination. . . ." *Humphries*, 834 F.2d at 374, 20 BRBS at 22 (CRT). The *Humphries* court, however, cited the "functional relationship" test set forth in *Herron* with approval, recognizing that it appeared to be "a more practical approach." *Id.*[2]

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[2] In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.[]Ct. 1585 (1988), claimant was struck by a car and was seriously injured coming from a restaurant "well over a mile from the terminal along a public highway which did not connect any portions of employer's operations or traverse continuous or contiguous terminal areas." *Id.*, 834 F.2d at 838, 20 BRBS at 24 (CRT). The restaurant was separated from the river and the nearest maritime terminal by a residential neighborhood. The court held that while a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds, the facts in this case "militate against any description of the accident scene as a maritime situs." *Id.* The court stated that the restaurant was not an "integral part" of the terminal. *Id.*

Factors to be considered in determining whether a site is an "adjoining area" under the *Herron* test include: the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances in the case. *See Herron*, 568 F.2d at 139, 7 BRBS at 411. In *Davis v. Doran Company of California*, 20 BRBS 121 (1987), *aff'd mem.*, No. 88-3505, 22 BRBS 3 (CRT) (4th Cir. 1989) (unpublished), the Board applied the *Herron* analysis and held that the place of business of the employer, who was engaged in the business of repairing marine propellers, did not meet the situs test. The facility did not front on water, was one mile by air and two miles by street from water, and was in an area not essentially maritime, as indicated by the presence of a bottling company, a linen service, an auto body shop, a public park, office buildings and residential houses in the area. The Board noted that the site was not chosen for its proximity to navigable waters and that such was merely fortuitous. The decision of the Board was affirmed by the Fourth Circuit in an unpublished opinion.

Applying the "functional relationship" criteria, the administrative law judge in the present case properly found that employer's Chautauqua facility is not an "adjoining area." The administrative law judge found that due to the mobile nature of containers and chassis, employer's business did not require a site particularly suited to maritime purposes.[3] The administrative law judge noted that 90 percent of the equipment brought into employer's facility came from interstate or other inland roads, thereby obviating the need for proximity to the terminal. The administrative law judge further determined that neither the adjoining properties nor those en route to the terminal were primarily devoted to maritime commerce; he found that the zoning was primarily residential and that with the exception of another container yard, the businesses present consisted of a wide variety of light commercial and non-maritime industrial uses. In addition, the administrative law judge noted that while the

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[3] Although the administrative law judge cited *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), it is the Board's decision which was affirmed by *Motoviloff, Bennett v. Matson Terminals, Inc.*, 14 BRBS 526, 530 (1981) (Miller, J., dissenting), that contains the rationale supporting the administrative law judge's statement.

gates of the terminal are eight-tenths of a mile from employer's facility, and the waterway beyond that, employer's site does not border any shipyard, railway, marine terminal or other facility used for loading or unloading of ships, vessels, or marine cargo. Decision and Order at 6. Finally, the administrative law judge determined that employer's location had not been chosen because of maritime concerns but simply because the City of Portsmouth offered employer low-rate industrial revenue financing. The administrative law judge inferred that since employer looked at different sites, including some in Chesapeake, geographical proximity to the terminal was not a primary concern.

Claimant argues that employer's facility is a covered situs as employer relocated only due to the expansion of the port, it remained in the same maritime business and chose a site near the terminal, and the new location was more spacious and efficient, thereby improving employer's maritime business. The administrative law judge reasonably found that the nature of employer's business did not require that the site be particularly well-suited for maritime purposes. Moreover, while claimant argues that the new site was

the closest to the port available at the time of relocation, the administrative law judge in this case reasonably concluded that employer had chosen the Chautauqua site for economic reasons. The administrative law judge's finding is supported in the record by the testimony of Wayne Matthews, employer's president. Although Mr. Matthews testified that the Chautauqua site was the closest site to the terminal available at the time of the relocation, he also stated that the site had been chosen because of the favorable financing offered by the City of Portsmouth. Tr. at 45-46.

Claimant's argument that since employer's overall work activities have not changed since it moved from the terminal, workers such as claimant who are engaged in maritime employment remain covered by Section 3(a), also must fail.[4] Claimant's argument confuses the determination of status with that of

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[4] In *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), the Third Circuit, employing a similar analysis to that suggested by the claimant[,] virtually eliminated the situs requirement. In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), the Fourth Circuit characterized the *Sea-Land* approach as unacceptable.

situs. The breadth of the requirements of claimant's employment does not enlarge situs under the Act; thus, an employee injured while working off a covered situs is not covered by the Act even if within the course of maritime employment. *See Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994); *Cabaleiro v. Bay Refractory Co[.], Inc.*, 27 BRBS 72 (1993). Moreover, the fact that a site is used for a maritime purpose does not automatically bring it within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury with navigable waters. *See Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd*, 853 F.2d 919 (3d Cir. 1988) (table); *Davis*, 20 BRBS at 125; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27, 17 BRBS 78, 83-84 (CRT) (1985); *Caputo*, 432 U.S. at 249, 6 BRBS at 150. While claimant also contends that mobile trucks were dispatched to the terminal to perform minor shipside repairs, the record indicates that claimant worked only at the Chautauqua site, and it is undisputed that his accident occurred there.

As coverage under Section 3(a) is determined by the nature of the place of work

at the moment of injury, we reject claimant's arguments that performing maritime work converts a site to an area covered by the Act.[5] As the administrative law judge properly applied the "functional relationship" test, and his conclusions are rational, supported by substantial evidence of record and in accordance with law, his determination that claimant's injury did not occur on a covered situs is affirmed. *Accord Lasofsky*, 20 BRBS at 60; *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982). The administrative law judge's denial of the

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[5] As the administrative law judge's finding that claimant's injury did not occur on a covered situs is dispositive, we need not address employer's argument that claimant did not have status under the Act. We note, however, that employer's argument that claimant was not engaged in maritime employment because repair of the vast majority of containers and chassis at employer's facility was done in anticipation of land and not maritime transportation, is without merit. It is well settled that container repair is covered employment, as it involves an integral part of an ongoing longshore operation. *See, e.g., Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1988), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Caldwell v. Oceanic Container Service, Inc.*, 13 BRBS 153 (1980); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980); *Cabezas v. Oceanic Container Service, Inc.*, 11 BRBS 279 (1979).

claim is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 92-1720: Christopher S. Sidwell v. Express Container Services and Travelers Insurance Company (Case No. 91-LHCA-0242) (OWCP No. 05-0076027)

I certify that this Decision and Order was sent this day to:

_____ _____

Date Paul E. Trayers
Clerk of the Board

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APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: Sidwell v. Express Container Services, Inc., 26 BRBS 127 (ALJ) (1991) (ALJ No. 91-LHC-0242).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE No. 91-LHC-242
OWCP No. 5-76027

In the Matter of

CHRISTOPHER S. SIDWELL,
Claimant,

v.

EXPRESS CONTAINER SERVICES,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest.

APPEARANCES:

John H. Klein, Esq.,
For The Claimant

Thomas J. Duff, Esq.,
For The Employer

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter the "Act").

A formal hearing was held December 2, 1991 in Hampton, Virginia, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions,

regulations and pertinent precedent.[1]

STIPULATIONS

The Employer and the Claimant stipulate, and I find:

1. At all relevant times, an employer/employee relationship existed.

2. The Claimant sustained an injury arising out of and in the course of his employment on June 11, 1990.

3. The claim was timely filed, there was timely notice of injury, and there was timely controversion by the Employer.

4. The Claimant was paid compensation by the Employer under the state Workers' Compensation Act for the period June 12th through September 14th, 1990.

5. The Claimant's medicals were paid

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[1] The following abbreviations will be used as citations to the record:

CX- Claimant's Exhibits
EX- Employer's Exhibits
TR- Transcript of the Hearing

by the Employer under the state Workers' Compensation Act.

ISSUES

Whether this claim falls under the jurisdiction of the Act?

What is the Claimant's average weekly wage?

FINDINGS OF FACT

Testimony of Christopher Sidwell

Claimant was employed as a container mechanic at the time of his injury. (TR 14). He has been employed by Employer for fourteen (14) years, during which time he has been a member of the International Longshoreman's Association. (TR 13). He testified that his job was to repair containers, units used for importing and exporting goods, and the chassis used to carry the containers over the road. (TR 16-17). Employer performs repairs both at shipside and at its Chautauqua Avenue site, but Claimant has worked only at the Chautauqua site since 1988. (TR 19-20, 23-24). Claimant testified that, on June 11, 1990, he was pulling a chassis from a repair bay with a Hustler when the door suddenly flew open and

he almost fell out, resulting in an injury (TR 21).

Testimony of Wayne T. Matthews

Mr. Matthews is the President of Express Container Services (hereinafter "Express") and has been for approximately 15 years. (TR 33). Express primarily repairs cargo containers and chassis. They contract directly with steamship lines and do not have any agreement with the terminal itself or with the Virginia Port Authority. (TR 34). Mr. Matthews testified that approximately ninety (90) percent of the containers and chassis come into the site via inland roads, and that the rest come directly from the terminal. After the equipment is checked and any necessary repairs are performed, the steamship company is notified and a carrier comes to get it. (TR 36-37). Express also performs minor repair work at the terminal site by means of mobile trucks. (TR 38). Employees do not normally alternate from the shop site to the mobile trucks or vice versa, rather they work at one or the other. (TR 39). Mr. Matthews testified that he classified Claimant as a major repair mechanic assigned to work in the Chautauqua site's shop. (TR 42). Shipside work used to be available on weekends as overtime on a

rotation basis to all mechanics, but that changed near the beginning of 1990 such that shop mechanics did their overtime in the shop and the terminal mechanics worked shipside. (TR 41).

Mr. Matthews testified that in 1985, the state was interested in buying Express' former location, the Hill Avenue site, to expand the terminal, so Express sought a new location. (TR 43-45). He said Express looked at a number of sites, but the city of Portsmouth offered the best deal on the Chautauqua site, including low rate industrial revenue financing which "really sold us." (TR 45). He agreed that the Chautauqua was the closest one available to the terminal, and that it has larger bays and more storage area than the Hill Avenue site. (TR 46).

Testimony of Shelby West

Mr. West is the Zoning Administrator for the City of Portsmouth and has been for the last 29 years. (TR 52). Using a map, Mr. West described the area involved, including the terminal and the Chautauqua site. (EX C). He outlined the most direct route between the two, a route covering eight tenths (8/10) of a mile. (TR 54-55). He listed the businesses

and properties in the immediate surrounding area, including: a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air conditioning contractor, a gas station, a fire station, a container yard, a storage area owned by Nissan, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. (TR 56-66).

He testified that Express was previously located on Hill Avenue, adjacent to the terminal, but that they moved in 1985 to the Chautauqua site. (TR 34). He also testified that Express is located in an area zoned M-2, or heavy industrial, but that container repair can also be done in M-1, or light industrial areas.

DISCUSSION AND CONCLUSIONS OF LAW

Before 1972, coverage under the Act was determined primarily by the traditional "locality" test of maritime tort jurisdiction. This test resulted in longshoremen moving in and out of coverage as they moved from ship to pier. In 1972, Congress amended the Act to

protect these so-called "amphibious workers." First, Congress extended the Act landward by including "any adjoining pier, wharf, dry dock, terminal, building way, marine way, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. § 903(a). This is traditionally referred to as the "situs" requirement. Congress also added a parallel "status" requirement limiting the landward coverage to workers "engaged in maritime employment including any longshoremen or other [person] engaged in longshore operations and any harbor workers including a ship repairman, ship builder, and ship breaker[. . . . .]" 33 U.S.C. § 902(3). It is well settled that both status and situs must be established before jurisdiction can be asserted under the Act. Humphries v. Director, OWCP, 834 F.2d 372, 374 (4th Cir. 1987).

Status

Employer contends that Claimant does not satisfy the status test because his work is devoted to facilitating the movement of containers and chassis over land. I cannot agree, since it seems indisputable that continual maintenance and repair is essential to the continued use of containers in

longshoring operations. The Board has held likewise on many occasions. See Caldwell v. Oceanic Container Service, Inc., 13 BRBS 153 (1980); Insinna v. Sea-Land Service, Inc., 12 BRBS 772 (1980); Cabezas v. Oceanic Container Service, Inc., 11 BRBS 279 (1979).

Situs

In interpreting Section 903(a), the "situs" test, the Supreme Court has ruled that the language of the Act is broad and should be liberally construed in order to avoid any harsh results under this remedial type of legislation. P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 74, 100 S.[ ]Ct. 328, 333, 62 L.Ed.[]2d 225, 230 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267-68, 97 S.[ ]Ct. 2348, 2359, [53] L.Ed.[]2d 320 (1977). Consequently, the Court has taken an expansive view towards the Act in order to extend coverage. Nevertheless, even with this expansive view in mind, the Court has clearly stated that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426, 105 S.[ ]Ct. 1421, 1429, 84 L.Ed.[]2d 406, 414 (1985).

The Fourth Circuit faced the situs test in Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), and acknowledged that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime operation'" in order to qualify as a maritime situs under the Act. Id.[] at 373-74. However, the court also recognized that boundaries to coverage do exist. Davis v. Doran Company of California, 22 BRBS 3 (4th Cir. 1989). The court in Humphries approvingly cited the Ninth Circuit approach to determining situs boundaries enunciated in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1987). The Brady-Hamilton test employs a four-pronged analysis in determining if an area is maritime. The four factors are:

> 1. The particular suitability of the site for the maritime uses referred to in the statute;
>
> 2. Whether adjoining properties are devoted primarily to uses in maritime commerce;
>
> 3. The proximity of the site to the waterway;

4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

In the present case, there are no outstanding characteristics of the site that make it especially suitable for maritime use. As the Board stated in Motoviloff v. Director, OWCP, 692 F.[]2d 87 (9th Cir. 1982), container and chassis repair does not require a site particularly suited to maritime purposes due to their mobile nature. Here, ninety percent (90%) of the equipment brought into the Chautauqua site came from interstate or other inland roads. Thus, proximity to the terminal is not essential for the Employer's business.

As described by Mr. West, the properties adjacent to Express' site, as well as those en route to the terminal, are definitely not primarily devoted to maritime commerce. The wide variety of businesses enumerated above consist mainly of light commercial and industrial uses, none of which are maritime in nature, other than the one container yard. In fact, there is more residential zoning in the area than any other use, and, as such, the area hardly qualifies as 'primarily maritime'.

The third factor is proximity to the waterway. Mr. West testified that the gates of the terminal are eight tenths (8/10) of a mile from the Chautauqua facility, and, as evidenced by the map, the waterway is beyond that. The site does not adjoin or border any shipyard, railway, marine terminal or other facility used for the loading and unloading of ships, vessels or marine cargo.

The last factor looks at whether the site is as close to the waterway as feasible. In 1985, the Employer moved from its previous location, adjacent to the terminal, to its present site. Mr. Matthews testified Express looked at various locations in different cities, but that what 'sold' them was the City of Portsmouth's offer for low-rate industrial revenue financing. The fact that Express looked at different sites, including some in Chesapeake, shows that geographical proximity to the terminal was not a primary concern.

Application of the Brady-Hamilton test shows that the Employer's Chautauqua site lacks a "functional relationship" with the navigable waters. Because situs is lacking, I need not address the average weekly wage issue.

ORDER

Accordingly, the Claimant's claim for compensation under the Act is hereby DENIED for lack of subject matter jurisdiction.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ABC/ccb
DATED: MAY 7, 1992
Hampton, Virginia

APPENDIX D

Order of the United States Court of Appeals for the Fourth Circuit Filed on January 29, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,
Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101
Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,
Respondent.

ORDER

Upon a poll of the active circuit judges on a sua sponte suggestion of rehearing en banc, a majority of the judges voted to deny rehearing en banc.

Chief Judge Ervin and Judges Hall, Murnaghan, Michael and Motz voted to rehear

the case en banc. Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing en banc.

Entered at the direction of Judge Luttig.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX E

Order of the United States Court of Appeals for the Fourth Circuit Filed on February 20, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,
Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101
Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,
Respondent.

ORDER

Director, OWCP has filed a motion for extension of time to file a petition for rehearing.

The Court denies the motion.

FOR THE COURT,

/s/ Bert M. Montague

CLERK

APPENDIX F

United States Court of Appeals
Circuit Filed on February 20,

STATES COURT OF APPEALS
. THE FOURTH CIRCUIT

SIDWELL,
Petitioner,

CE OF WORKERS'
'ROGRAMS, UNITED
IENT OF LABOR, No. 95-1101
Intervenor,

:NER SERVICES,

Respondent.

MANDATE

ıent of this Court dated 12/28/95
:oday.

Bert M. Montague
CLERK

LXVIII

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
APR 26 1996
CLERK

No. 95-1569

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

CHRISTOPHER S. SIDWELL,
Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC.,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor/Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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4/17

QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit err in defining "other adjoining area," as set forth in 33 U.S.C. § 903(a), in terms of location with respect to navigable waters and function with respect to maritime use?

PARTIES TO THE PROCEEDING

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By: John H. Klein, Esq.
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Express Container Services, Inc., Respondent[1]
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(Continued on next page)

---

[1] This party has no parent or subsidiary corporate affiliation.

PARTIES TO THE PROCEEDING

(Continued from previous page)

Director, Office of Workers' Compensation [illegible]
U.S. DEPARTMENT OF LABOR,
Intervenor/Respondent[2]
By: Michael J. Denny, Esq.
Carol A. DeDeo, Esq.
Office of the Solicitor
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200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 219-4405

---

[2] The Director, Office of Workers' Compensation Programs, was dismissed as a party respondent by the Court of Appeals for the Fourth Circuit. The Director was subsequently allowed to intervene and was required by the court to be aligned with the Petitioner. The Director is shown as a Respondent in the Petition for Writ of Certiorari only because of the requirements of Supreme Court Rule 12.6. It is Respondent ECS's position that the Director is not a proper party to these proceedings, based on this Court's decision in ***Director, OWCP v. Newport News Shipbuilding & Drydock Co.***, 115 S.Ct. 1278 (1995). Moreover, the Director has not filed a timely response supporting the Petition as required by Rule 12.6, but has filed a request to extend the time for filing, which Respondent ECS has opposed. It has been suggested that the Director should no longer be listed as a party to these proceedings, but no Motion to that effect has been filed pending the ruling on the request for extension of time.

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OPINIONS BELOW

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: ***Sidwell v. Express Container Services, Inc.***, 26 BRBS 127 (ALJ) 1991 (ALJ No. 91-LHC-2042).

Decision of the Benefits Review Board, United States Department of Labor, dated December 29, 1994: ***Sidwell v. Express Container Services, Inc.***, BRB NO. 92-1720 (1994).

Decision of the United States Court of Appeals for the Fourth Circuit: ***Sidwell v. Express Container Services, Inc.***,71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

STATEMENT OF JURISDICTION

The Statement of Jurisdiction was correctly presented in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS

The Petition for Writ of Certiorari correctly sets forth the statutory provision at issue in this matter.

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. ("LHWCA" or the "Act"). The matter was heard before Administrative Law Judge Richard K. Malamphy of the United States Department of Labor to determine whether there was jurisdiction under the LHWCA with respect to the injuries suffered by Petitioner, Christopher S. Sidwell, on June 11, 1990.

Petitioner was injured while working for Respondent, Express Container Services, Inc. ("ECS"), as a container mechanic at a facility located on Chautauqua Avenue in Portsmouth, Virginia. ECS is in the business of repairing cargo containers and the chassis used to carry them. ECS's facility was previously located near the gate of Portsmouth Marine Terminals ("Terminal"), where

vessels are loaded and unloaded from the Elizabeth River. In 1985, the Terminal expanded and purchased ECS's facility at which time ECS relocated to its present facility, eight-tenths of a mile from the Terminal. The current location is surrounded by various businesses and residential developments. ECS contracts directly with steamship lines and does not have any agreement with the Terminal itself. Approximately 90% of the containers and chassis arrive at the Chautauqua facility by inland roads, while the remainder come from the Terminal. ***Sidwell v. Express Container Services, Inc.***, 71 F.3d 1134, 1135 (4th Cir. 1995). (App. A at III-IV).[3]

The Administrative Law Judge dismissed the claim because he found that the Chautauqua site did not meet the situs requirements of the Act. That is, it was not an

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[3] Citation to "App." refers to Petitioner's Appendices to the Petition for Writ of Certiorari. Note that Appendix C (the Decision of the Administrative Law Judge) has also been attached to this Brief because the pages are not in the correct order in Petitioner's Appendix C.

area "adjoining" navigable waters as required by 33 U.S.C. § 903(a). In making this determination, the Administrative Law Judge utilized the "functional relationship" test enunciated by the Ninth Circuit in ***Brady-Hamilton Stevedore Co. v. Herron***, 568 F.2d 137 (9th Cir. 1978). (App. C).

Claimant requested review of that decision before the Benefits Review Board, the appropriate reviewing agency. By Order dated December 29, 1994, the Board affirmed, also utilizing the functional relationship analysis.

Claimant requested review before the United States Court of Appeals for the Fourth Circuit. In affirming, the panel examined both the Ninth Circuit approach and the "totality of the circumstances" test adopted by the Fifth Circuit in ***Texports Stevedore Co. v. Winchester***, 632 F.2d 504 (5th Cir. 1980), ***cert. denied***, 452 U.S. 905 (1981), but chose to adopt a simpler, but similar approach. The panel stated that "[t]he plain language of the LHWCA requires

that covered situses actually 'adjoin' navigable waters . . ." *Id.* (App. A at XV). In addition, the panel held, the "area" where the injury occurred must be a "discrete shoreside facility" which is "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." ***Sidwell***, 71 F.3d at 1139. (App. at XIX-XXI). Thus, the Fourth Circuit adopted a situs test which is based on the plain language of the statute and examines both function *and* location.

The Court of Appeals also pointed out that under ***Brady-Hamilton***, and even a ***Texports*** "totality of the circumstances" test, claimant would not have met the situs requirements of the Act. *Id.* at 1141, n. 12. (App. A. at XXVI).

ARGUMENTS FOR DENYING THE PETITION

I. The Petition for Writ of Certiorari exaggerates the conflict between the circuits.

The Petitioner correctly points out that a number of circuits have considered the situs aspect of jurisdiction under the Longshore and Harbor Workers' Compensation Act. However, the tests utilized by the various circuits are not as different as the Petitioner suggests and, it is submitted, the differences that do exist do not amount to a matter of national significance.

The crux of the dispute centers on Congress's 1972 addition of a "situs" requirement for jurisdiction under the LHWCA. Assuming that an injured employee has requisite maritime "status," as defined in 33 U.S.C. § 902(3), jurisdiction will only attach when the injury occurs on a specific "situs." 33 U.S.C. § 903(a) limits coverage to:

> [a]ny injury occurring upon the navigable waters of the United States (including any

> adjoining pier, wharf, drydock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

(emphasis added). Because the injury to the Petitioner herein, and the other cases cited, did not occur upon navigable waters or one of the enumerated areas, the question revolves around the limits of the phrase "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

In ***Brady-Hamilton Stevedore Co. v. Herron***, 568 F.2d 137 (9th Cir. 1978), then Judge Kennedy wrote for the Ninth Circuit:

> In order to further Congress' goal of uniform coverage, the phrase "adjoining area" should be read to describe a *functional relationship* that does not, in all cases, depend upon physical contiguity. Consideration should be given to the following facts, among others, in determining whether or not a site is an "adjoining area" under § 903(a): the particular suitability of the site for the maritime uses referred to in the statute;

> whether adjoining properties are devoted primarily to use in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. at 141 (emphasis added).

In ***Texports Stevedore Co. v. Winchester***, 632 F.2d 504 (5th Cir. 1980), ***cert. denied***, 452 U.S. 905 (1981), an *en banc* Fifth Circuit utilized a less specific "totality of the circumstances" test:

> All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes.

Id. at 514. In further defining "adjoining area," that court noted that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, employee's injury can come within the LHWCA." *Id.* Further, "[t]he perimeter of an area is defined by function. The 'area' must be one customarily used by an employer in loading,

unloading, repairing or building a vessel." *Id.* at 515. The court went on to examine the facts of the particular case and looked to factors very similar to the ones enumerated by the Ninth Circuit:

> [I]n this case, the . . . gear room was not clearly outside the waterfront area customarily used by employers for gear rooms. . . . The ALJ found that the gear room operations were part of the ongoing, overall loading process . . . He found that the gear room was "in the most desirable position for servicing the docks" . . . and that the gear rooms of most stevedores were not on the docks proper . . . . The gear room was as close to the dock as was feasible . . . . Not only does the area **adjoin the navigable waterway**, but the gear room itself has a sufficient nexus to the waterfront.

Id. at 515 (emphasis added).

Finally, in ***Triguero v. Consolidated Rail Corp.***, 932 F.2d 95 (2d Cir. 1991), a panel of the Second Circuit utilized a very similar "test" for situs. The ***Triguero*** court cited the ***Brady-Hamilton*** test with approval and also

looked to whether the situs of the injury was "an integral part of the shipyard despite the distance of the situs from the waterway." *Id.* at 100-101.[4] Thus, the ***Triguero*** court essentially adopted the ***Brady-Hamilton*** "functional" approach.

When the tests for situs espoused by each of these circuits is examined closely, it becomes obvious that the Fifth (***Texports***) and Ninth Circuits' (***Brady-Hamilton***) approaches are more similar than they are different and, when analyzed side by side with the Fourth Circuit test, it is obvious that there is not an intolerable conflict which must be addressed by this Court. The Fourth Circuit adopted a test which examines function and location just as the other circuits did. The test created by the Fourth Circuit is arguably simpler and, consequently, easier to

---

[4] Respondent agrees with Petitioner's position that ***Sea-Land Service, Inc. v. Director, OWCP***, 540 F.2d 629 (3d Cir. 1978), was discredited by this Court in ***Northeast Marine Terminal, Inc. v. Caputo***, 432 U.S. 249 (1977) and is not a factor in the argument. (Petition at 11, n. 3).

apply, but it is not as dramatic a departure as the Petitioner asserts. The Petitioner's focus on the "adjoining" aspect of the situs test obscures the totality of the Fourth Circuit's holding, which requires an examination of both *location* and *function* in order to determine situs.

The ***Sidwell*** panel examined the plain meaning of the statute and found that, as to "adjoining" navigable waters, the area must be contiguous or otherwise touch such waters. While that language may at first glance appear more restrictive than the Ninth or Fifth Circuits' formulations, the differences are not significant. The Fourth Circuit took care to point out that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a plaintiff is injured . . . . the physical distance is not decisive . . . . The test is whether the situs is within a contiguous shipbuilding area which adjoins the water." ***Sidwell***, 71 F.3d

at 1140, n. 11, quoting ***Alabama Drydock & Shipbuilding Co. v. Kininess***, 554 F.2d 176, 178 (5th Cir.), ***cert. denied***, 434 U.S. 903 (1977). (App. A at XXI-XXII).

Having determined the meaning of "adjoining," the court next examined the meaning of "area," stating: "the statute specifies that coverage extends to injuries sustained on "any adjoining pier, wharf, drydock, terminal, building way, marine rail way, *or other adjoining area . . .*" ***Sidwell***, 71 F.3d at 1139. (App. A at XIX). The court instructed that "area" must be defined with reference to this language of qualification. Next, examining the use of the word "other," the court stated: "use of the word 'other' following the enumerated adjoining areas confirms that the scope and nature of the 'other adjoining areas' are to be defined by reference to the enumerated area[s]. . . ." Therefore, an "other adjoining area" as to which coverage extends must be *like* a pier, wharf, drydock, terminal, building way, or marine railway, that is, a *discrete shoreside*

structure or facility. *Id*. Finally, the asserted area must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, as the statute provides.

Thus, like the Fifth and Ninth Circuits, the Fourth Circuit situs test examines function, as well as location. The Ninth Circuit looks to the "functional relationship" of the injury situs to maritime use, but also examines the proximity of the injury situs to the waterway. ***Brady-Hamilton***, 568 F.2d at 141. The Fifth Circuit looks to the "totality of the circumstances," but notes that the perimeter of the area is "defined by function," as well as proximity to the navigable waterway. ***Texports***, 632 F.2d at 514, 515. While the Fourth Circuit does create a clearer line, perhaps, than that set forth by other circuits, the Fourth Circuit situs test does not subject longshoremen in Virginia to an intolerably different scope of coverage than longshoremen in Louisiana, California or New York.

II. **The resolution of the conflict between the Fourth Circuit and the other circuits is irrelevant to the outcome of this case.**

The Fourth Circuit took care to point out that, under the facts of the case before them, Petitioner's injury did not occur on a covered situs even if the Ninth Circuit's "functional relationship" or the Fifth Circuit's "totality of the circumstances" tests were utilized. In Footnote 12 of the Opinion, the court stated:

> ECS also fails the ***Brady-Hamilton*** test and even a "totality of the circumstances test." The ALJ expressly found that "there are no outstanding characteristics of the situs that make it especially suitable for maritime use," the adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8\10 of a mile from the site, and the water is even farther . . . . Therefore, even if we had declined to read the statute as it is written, and had instead adopted the ***Brady-Hamilton*** test, or simply looked to the totality of the circumstances, we would still have affirmed the Board.

Sidwell, 71 F.3d at 1141, n 12. (App. A at XXVI).

Thus, even if this Court were to grant the Petition for Writ of Certiorari and find that the Fourth Circuit situs test is not correct, the facts as determined by the Administrative Law Judge and affirmed by the Benefits Review Board would support a finding of no covered situs under all of the other formulations of the situs test.

III. The Decision of the Fourth Circuit in this case is consistent with prior decisions of other panels of the Court of Appeals for the Fourth Circuit.

Prior to *Sidwell*, the Fourth Circuit had considered the situs question in two cases, without ever developing a comprehensive test. ***Newport News Shipbuilding & Drydock Company v. Graham***, 573 F.2d 167 (4th Cir.), ***cert. denied***, 439 U.S. 979 (1978); ***Humphries v. Director, OWCP***, 834 F.2d 372 (4th Cir. 1987), ***cert. denied*** 485 U.S. 1028 (1988).

In ***Sidwell***, the Fourth Circuit acknowledged these prior decisions, noted the lack of a "touchstone for all future LHWCA jurisdictional questions" and declared, "we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied." ***Sidwell***, 71 F.3d at 1138 (App. A at XIII).

Thus, the Fourth Circuit itself addressed whether its prior decisions were determinative of the situs issue and decided they were not. An analysis of ***Graham*** and ***Humphries*** confirms that, prior to ***Sidwell***, there was no comprehensive situs test in the Fourth Circuit. ***Graham*** contains a brief, one paragraph discussion of the issue. The ***Graham*** court found that two sites, a submarine shop and a foundry, 120 and 3,000 feet from the water's edge satisfied the situs test because they were an "integral part" of the shipyard. ***Graham***, 573 F.2d at 169.

In ***Humphries***, the Fourth Circuit engaged in a much more lengthy discussion of situs and examined the ***Brady-Hamilton***, ***Sea-Land***, and ***Texports*** approaches. Ultimately, however, the court *expressly declined* to establish a comprehensive test and simply recited a number of factors which resulted in a conclusion that the accident in that case did not occur on a maritime situs. *Id.* at 375. Among the factors considered by the court were that the accident occurred over a mile from the Terminal, along a "public highway which did not connect any portions of [the employer's] operations or traverse continuous or contiguous terminal areas." *Id.* In addition, the restaurant where the injury occurred was "separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood." *Id.*

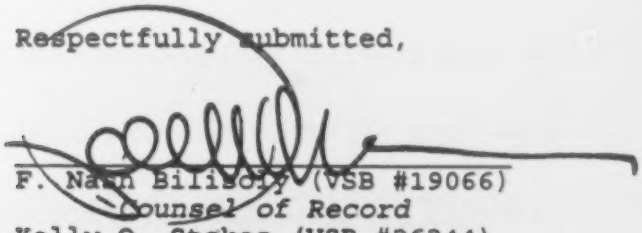
Thus, contrary to the assertions of Petitioner, ***Sidwell*** does not conflict with Fourth Circuit precedent. In ***Graham***, the Fourth Circuit barely addressed the situs

issue. In ***Humphries***, the Fourth Circuit expressly declined to state a "touchstone" for all future decisions. In ***Sidwell***, however, the time was ripe. The Fourth Circuit took the opportunity and developed a comprehensive situs test which examines function and location and is based on the plain language of the statute.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: ***Sidwell v. Express Container Services, Inc.***, 26 BRBS 127 (ALJ) (1991) (ALJ No. 91-LHC-0242).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE No. 91-LHC-242

OWCP No. 5-76027

In the Matter of

CHRISTOPHER S. SIDWELL,

Claimant,

v.

EXPRESS CONTAINER SERVICES,

Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest.

APPEARANCES:

John H. Klein, Esq.,
For The Claimant

Thomas J. Duff, Esq.,
For The Employer

BEFORE:RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter the "Act").

A formal hearing was held December 2, 1991 in Hampton, Virginia, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory

provisions, regulations and pertinent precedent.[1]

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[1] The following abbreviations will be used as citations to the record:

CX - Claimant's Exhibits
EX - Employer's Exhibits
TR - Transcript of the Hearing

STIPULATIONS

The Employer and the Claimant stipulate, and I find:

1. At all relevant times, an employer/ employee relationship existed.

2. The Claimant sustained an injury arising out of and in the course of his employment on June 11, 1990.

3. The claim was timely filed, there was timely notice of injury, and there was timely controversion by the Employer.

4. The Claimant was paid compensation by the Employer under the state Workers' Compensation Act for the period June 12th through September 14th, 1990.

5. The Claimant's medicals were paid by the Employer under the state Workers' Compensation Act.

ISSUES

Whether this claim falls under the jurisdiction of the Act?

What is the Claimant's average weekly wage?

FINDINGS OF FACT

Testimony of Christopher Sidwell

Claimant was employed as a container mechanic at the time of his injury. (TR 14). He has been employed by Employer for fourteen (14) years, during which time he has been a member of the International Longshoreman's Association. (TR 13). He testified that his job was to repair containers, units used for importing and exporting goods, and the chassis used to carry the containers over the road. (TR 16-17) . Employer performs repairs both at shipside and at its Chautauqua Avenue site, but Claimant has worked only at the Chautauqua site since 1988. (TR 19-20, 23-24). Claimant testified that, on June 11, 1990, he was pulling a chassis from a repair bay with a Hustler when the door suddenly flew open and he almost fell out, resulting in an injury. (TR 21).

Testimony of Wayne T. Matthews

Mr. Matthews is the President of Express Container Services (hereinafter "Express") and has been for approximately 15 years. (TR 33). Express primarily repairs cargo containers and chassis. They contract directly with steamship lines and do not have any

agreement with the terminal itself or with the Virginia Port Authority. (TR 34). Mr. Matthews testified that approximately ninety (90) percent of the containers and chassis come into the site via inland roads, and that the rest come directly from the terminal. After the equipment is checked and any necessary repairs are performed, the steamship company is notified and a carrier comes to get it. (TR 36-37). Express also performs minor repair work at the terminal site by means of mobile trucks. (TR 38). Employees do not normally alternate from the shop site to the mobile trucks or vice versa, rather they work at one or the other. (TR 39). Mr. Matthews testified that he classified Claimant as a major repair mechanic assigned to work in the Chautauqua site's shop. (TR 42). Shipside work used to be available on weekends as overtime on a rotation basis to all mechanics, but that changed near the beginning of 1990 such that shop mechanics did their overtime in the shop and the terminal mechanics worked shipside. (TR 41).

Mr. Matthews testified that in 1985, the state was interested in buying Express' former location, the Hill Avenue site, to expand the terminal, so Express sought a new location. (TR 43-45). He said Express looked at a

number of sites, but the city of Portsmouth offered the best deal on the Chautauqua site, including low rate industrial revenue financing "which really sold us." (TR 45). He agreed that the Chautauqua was the closest one available to the terminal, and that it has larger bays and more storage area than the Hill Avenue site. (Tr. 46).

Testimony of Shelby West

Mr. West is the Zoning Administrator for the City of Portsmouth and has been for the last 29 years. (TR 52). Using a map, Mr. West described the area involved, including the terminal and the Chautauqua site. (EX C). He outlined the most direct route between the two, a route covering eight tenths (8/10) of a mile. (TR 54-55). He listed the businesses and properties in the immediate surrounding area, including: a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air conditioning contractor, a gas station, a fire station, a container yard, a storage area owned by Nissan, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. (TR 56-66).

He testified that Express was previously located on

Hill Avenue, adjacent to the terminal, but that they moved in 1985 to the Chautauqua site. (TR 34). He also testified that Express is located in an area zoned M-2, or heavy industrial, but that container repair can also be done in M-1, or light industrial areas.

DISCUSSION AND CONCLUSIONS OF LAW

Before 1972, coverage under the Act was determined primarily by the traditional "locality" test of maritime tort jurisdiction. This test resulted in longshoremen moving in and out of coverage as they moved from ship to pier. In 1972, Congress amended the Act to protect these so-called "amphibious workers." First, Congress extended the Act landward by including "any adjoining pier, wharf, dry dock, terminal, building way, marine way, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. § 903(a). This is traditionally referred to as the "situs" requirement. Congress also added a parallel "status" requirement limiting the landward coverage to workers "engaged in maritime employment including any longshoremen or other [person] engaged in longshore operations and any

harbor workers including a ship repairman, ship builder, and ship breaker [. . . .]" 33 U.S.C. § 902(3). It is well settled that both status and situs must be established before jurisdiction can be asserted under the Act. ***Humphries v. Director***, OWCP, 834 F.2d 372, 374 (4th Cir. 1987).

Status

Employer contends that Claimant does not satisfy the status test because his work is devoted to facilitating the movement of containers and chassis over land. I cannot agree, since it seems indisputable that continual maintenance and repair is essential to the continued use of containers in longshoring operations. The Board has held likewise on many occasions. See ***Caldwell v. Oceanic Container Service, Inc.***, 13 BRBS 153 (1980); ***Insinna v. Sea-Land Service, Inc.***, 12 BRBS 772 (1980); ***Cabezas v. Oceanic Container Service, Inc.***, 11 BRBS 279 (1979).

Situs

In interpreting Section 903(a), the "situs" test, the Supreme Court has ruled that the language of the Act is broad and should be liberally construed in order to avoid

any harsh results under this remedial type of legislation. ***P.C. Pfeiffer Co., Inc. v. Ford***, 444 U.S. 69, 74, 100 S.[ ]Ct. 328, 333, 62 L.Ed.[]2d 225, 230 (1979); ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249, 267-68, 97 S.[]Ct. 2348, 2359, [53] L.Ed.[]2d 320 (1977). Consequently, the Court has taken an expansive view towards the Act in order to extend coverage. Nevertheless, even with this expansive view in mind, the Court has clearly stated that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." ***Herb's Welding, Inc. v. Gray***, 470 U.S. 414, 426, 105 S.[]Ct. 1421, 1429, 84 L.Ed. []2d 406, 414 (1985).

The Fourth Circuit faced the situs test in ***Humphries v. Director, OWCP***, 834 F.2d 372 (4th Cir. 1987), and acknowledged that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime operation'" in order to qualify as a maritime situs under the Act. *Id.*[] at 373-74. However, the court also recognized that boundaries to coverage do exist. ***Davis v. Doran Company of California***, 22 BRBS 3 (4th Cir. 1989). The court in *Humphries* approvingly cited the Ninth Circuit approach to determining situs boundaries enunciated in

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1987). The ***Brady-Hamilton*** test employs a four-pronged analysis in determining if an area is maritime. The four factors are:

> 1. The particular suitability of the site for the maritime uses referred to in the statute;
> 2. Whether adjoining properties are devoted primarily to uses in maritime commerce;
> 3. The proximity of the site to the waterway;
> 4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

In the present case, there are no outstanding characteristics of the site that make it especially suitable for maritime use. As the Board stated in ***Motoviloff v. Director, OWCP***, 692 F.[]2d 87 (9th Cir. 1982), container and chassis repair does not require a site particularly suited to maritime purposes due to their mobile nature.

Here, ninety percent (90%) of the equipment brought into the Chautauqua site came from interstate or other inland roads. Thus, proximity to the terminal is not essential for the Employer's business.

As described by Mr. West, the properties adjacent to Express' site, as well as those en route to the terminal, are definitely not primarily devoted to maritime commerce. The wide variety of businesses enumerated above consist mainly of light commercial and industrial uses, none of which are maritime in nature, other than the one container yard. In fact, there is more residential zoning in the area than any other use, and, as such, the area hardly qualifies as 'primarily maritime' .

The third factor is proximity to the waterway. Mr. West testified that the gates of the terminal are eight tenths (8/10) of a mile from the Chautauqua facility, and, as evidenced by the map, the waterway is beyond that. The site does not adjoin or border any shipyard, railway, marine terminal or other facility used for the loading and unloading of ships, vessels or marine cargo.

The last factor looks at whether the site is as close to the waterway as feasible. In 1985, the Employer moved from its previous location, adjacent to the terminal, to its

present site. Mr. Matthews testified Express looked at various locations in different cities, but that what 'sold' them was the City of Portsmouth's offer for low-rate industrial revenue financing. The fact that Express looked at different sites, including some in Chesapeake, shows that geographical proximity to the terminal was not a primary concern.

Application of the ***Brady-Hamilton*** test shows that the Employer's Chautauqua site lacks a "functional relationship" with the navigable waters. Because situs is lacking, I need not address the average weekly wage issue.

ORDER

Accordingly, the claimant's claim for compensation under the Act is hereby DENIED for lack of subject matter jurisdiction.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ABC/ccb
DATED: MAY 7, 1992
Hampton, Virginia

No. 95-1569

Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHRISTOPHER S. SIDWELL,

Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC.

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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II. *Respondent's Brief in Opposition mischaracterizes the fundamental distinction between the situs approach taken in this case and that taken in the various additional circuits which have addressed the issue*. 3

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. *The Petition for Writ of Certiorari does not exaggerate the conflict between the various federal circuits which have addressed the situs requirement under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901* et seq.

In its Brief in Opposition in this matter, Respondent, Express Container Services, Inc. ("Respondent"), acknowledges the clear conflict that the Fourth Circuit's decision creates with prior precedent from at least three distinct federal circuits, but suggests that that conflict is merely a minor conflict not worthy of redress by this Court. In so doing, Respondent suggests that Petitioner has overstated the conflict among the various other judicial circuits which have addressed the jurisdictional situs issue. In response, Petitioner again emphasizes that the various situs tests delineated by the Ninth, Fifth, and Second Circuits can all be classified generally as "functional" approaches to the situs inquiry under the Act. However, the Fourth Circuit's test is clearly distinct from those approaches. Simply put, as opposed to the Fourth Circuit's test, none of those "functional" approaches requires that the locus of the injury be physically contiguous with a navigable waterway. Further, merely categorizing these other decisions as taking a "functional" approach neither obviates the conclusion that a direct conflict exists among the functional approaches taken in those circuits and the restrictive approach taken in the immediate case nor minimizes the significance of that conflict. Simply put,

while in those three circuits the jurisdictional reach of the Longshore Act is not limited solely to areas which actually touch the navigable waters of the United States, application of the Act within the Fourth Circuit is strictly limited to such areas. Likewise, while in those cases separation from the waterway is not dispositive of the situs issue, the Fourth Circuit in the immediate case determined that, if the site where the injury occurs is separated from the water in any way, shape, or form, then even an admittedly maritime worker could not be covered by the Longshore Act.[1]

Further, even a cursory review of those cases reveals that the courts in question in those cases applied divergent tests and focused on different factors when analyzing the situs issue. For example, in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit delineated four specific factors for application in evaluating whether a claimant's injuries fall within the situs coverage of the LHWCA. If the locus of the injury in that jurisdiction does not, at a minimum, satisfy those factors, then LHWCA coverage does not exist. In Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), on the other hand, the Fifth Circuit adopted a

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[1] Note that, in its Brief in Opposition, Respondent "agreed" that the situs approach taken by the Third Circuit in Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976), was not a factor for consideration by this Court. Petitioner notes that, in his Petition, he explicitly relied upon that decision insofar as it illuminates (1) the disparity in interpretation and application of the situs requirement under the LHWCA and (2) the lack of and need for uniformity in that regard. With respect to the propriety or validity of that situs approach, Petitioner did not rely upon the decision and Respondent's "agreement" is proper.

"totality of the circumstances" approach that arguably extends well beyond the few factors set forth in Brady-Hamilton. Finally, in Triguero v. Consolidated Rail Corp., 932 F.2d 95 (2nd Cir. 1991), the Second Circuit cited both approaches with approval, suggesting a hybrid approach which focuses strongly on the Brady-Hamilton factors, while looking beyond those factors where warranted by the facts of the case before the court. If anything, these cases illustrate the fact that these various circuits, while applying similar approaches, do not apply the situs test under the Act in a uniform fashion. Instead, they take approaches under which varying factors may be dispositive of the situs inquiry. This despite the fact that such uniformity was explicitly envisioned by the drafters of the 1972 Amendments to the Act. Such a disparity in coverage and application of a federal Act designed to uniformly protect those engaged in maritime work is simply not insignificant.

II. *Respondent's Brief in Opposition mischaracterizes the fundamental distinction between the situs approach taken in this case and that taken in the various additional circuits which have addressed the issue.*

In its discussion of the conflict among the circuits with respect to the situs issue, Respondent posits that the test delineated by the Fourth Circuit in this case is in some way analogous to the "functional" approaches adopted and applied in the Fifth and Ninth circuits. In so doing, Respondent suggests that the restrictive test pronounced below examines both function and location and that both the Fifth and Ninth circuits examine these

factors in a comparable fashion. Respondent further intimates that the only real distinction between the approaches is that the Fourth Circuit's test creates a "clearer line" for defining situs coverage, and that such a line does not subject longshoremen in the Fourth Circuit "to an intolerably different scope of coverage" than longshoremen in those other circuits.

The statute in part defines the navigable waters of the U.S. to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area . . . ." 33 U.S.C. Section 903(a). When applying the "other adjoining area" language in that section, the section requires that the "area" be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Id. In light of that language, it is clear that some nexus or functional relationship between the site of the injury and the navigable waterways of the U.S. is required. Thus, to the extent that the Fourth Circuit in this case retained that requirement, Petitioner has at no time taken exception to that determination. However, Employer is plainly wrong in suggesting that such a requirement in any way qualifies the court's restrictive interpretation of the term "adjoining" as utilized in the statute.

In the immediate case, the Fourth Circuit explicitly determined that the LHWCA does not, under any circumstances, cover areas which do not physically touch the navigable waters of the U.S., irrespective of the function for which that site is used. The court then went on to state that, once that initial hurdle is met, the site must still maintain an appropriate nexus with the navigable waters of the U.S. to be a covered situs under the Act. The existence of this second hurdle simply does not diminish the significance of the improperly created

initial hurdle. Clearly, in the Fourth Circuit, non-contiguous areas can never be covered under the Act. At the same time, such areas can in fact be covered situses in each of the additional circuits highlighted in the Petition filed by the injured worker. Thus, in light of this fundamental distinction, any argument that the various situs tests are somehow analogous is simply incorrect.

III. *The resolution of the conflict between the Fourth Circuit's decision in the immediate case and the additional circuits which have addressed the situs requirement is in no way irrelevant to the outcome of the immediate case*.

This case involves an injury suffered to Petitioner while engaged in maritime employment at a site regularly used by his employer to repair ship loading and unloading equipment, specifically containers and their chassis. That site does not physically touch the navigable waterways of the United States. However, due to expansion of the Portsmouth Marine Terminal in prior years and to the terminal's need for Respondent's terminal site, Respondent had relocated its facility to the off-terminal location where Petitioner was injured. Clearly, given the situs test delineated by the Fourth Circuit in the instant case, the off-terminal facility could under no circumstances constitute an "adjoining area," thereby negating any potential LHWCA coverage for that location. In contrast, under a "functional" approach such as those applied in the Ninth, Fifth, or Second Circuits, such a location could indeed constitute an adjoining area entitled to such coverage. For example, the site in question arguably meets the four situs factors delineated

by the Ninth Circuit in Brady-Hamilton: (1) the large bays and large storage area of the site where Respondent moved are especially conducive to container repair; (2) at least some of the adjoining areas are used for maritime purposes; (3) the site is located only eight tenths of a mile from the terminal, which physically touches the water; and (4) the location, at the time Respondent moved from the terminal, was the closest available site to the terminal. In addition, as highlighted in Petitioner's Petition, the Brady-Hamilton court specifically stated that a primary consideration in making the situs determination is the extent to which the choice of the site upon which the injury occurred was governed by considerations of maritime economy, as arguably occurred in the case at bar.

Likewise, under the totality of the circumstances approach adopted by the Fifth Circuit in Texports Stevedore Co., the site in question could be deemed a covered situs. The language of that case, while clearly requiring a nexus with the waterfront, directly states that physical contiguity and the presence or absence of non-maritime buildings between the site and the water or surrounding the site is not determinative of the situs inquiry. Rather, that court placed great weight on whether the site is located as near to the waterfront as feasible and whether the site's operations are part of the ongoing overall loading, shipping, shipbuilding, or ship repair processes. As indicated above, the facts of this case support such findings in favor of Petitioner.

The same holds true under the generalized functional approach taken by the Second Circuit in Triguero. Again, that court indicated that distance from a navigable waterway and separation from that waterway are not determinative of a situs inquiry. In light of that

approach, and in light of the reliance of that court on both Brady-Hamilton and Texports, a situs finding in favor of Petitioner under that approach is similarly supported on the facts at bar.

Accordingly, while the situs test pronounced by the Fourth Circuit in this case indisputably forecloses any potential recovery under the Act for Petitioner, it is clearly arguable that he could in fact fall within LHWCA coverage under a separate "functional" approach, a result which Petitioner submits is more in keeping with the letter and spirit of the Longshore Act.[2]

IV. *As opposed to Respondent's suggestion in its Brief in Opposition, the decision of the Fourth Circuit in this matter is not consistent with prior Fourth Circuit precedent on point.*

In its Brief in Opposition, Respondent asserts that the decision rendered in this case is not in contravention of prior precedent within the Fourth Circuit. In brief

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[2] Finally, note that this conclusion is appropriate irrespective of the dicta relied upon by Respondent. Respondent's argument in this regard first assumes as controlling the court's dicta even though the various additional situs tests discussed above were explicitly rejected by the court. Respondent's argument also assumes that those approaches themselves are, in the alternative to the approach taken in this case, the proper approaches for purposes of determining situs coverage under the LHWCA. That assumption ignores the possibility that a separate inquiry is appropriate under the Act or that certain additional factors could be determinative in a situs inquiry. The argument also demotes as trivial the significance of the legal error presented by this case. If in fact, as a matter of law, the situs standard applied in this case is improper, that error, in its own right, should be corrected by this Court.

response to that contention, Petitioner again points to the cases of Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), and Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978). Each of those cases clearly applied a "functional" approach to the situs inquiry under the Act in which a location's proximity to the navigable waterways of the U.S. and separation of the site in question from such waterways, while factors for consideration, were not wholly dispositive of the situs issue.[3] Thus, in light of the court's holding in the immediate case that the locus of the injury must actually touch the navigable waterway and cannot be separated from the waterway in any way, shape, or form, the divergence between the cases is indisputable.

Admittedly, Humphries and Graham do not specifically set forth an explicit test to be applied in determining situs. However, in light of the factual contexts in which they arose, they clearly foreclosed a subsequent determination that the LHWCA's jurisdiction is limited to facilities which actually touch the navigable waters of the United States. Indeed, the court in Graham held that the situs test was satisfied with respect to a claimant who was injured at a foundry located approximately two and one-half blocks from the water's

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[3] In that regard, again note Judge Murnaghan's concurring opinion in Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. February 9, 1996) (No. 94-2653). In that opinion, Judge Murnaghan cited Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation' for it to be within the LHWCA's scope." Parker, 75 F.3d at 938 (citing Humphries, 834 F.2d at 373).

edge and separated from the water by two public streets. It is simply undeniable that, under the test delineated in the immediate case, that injury would not have been covered.

Along the same lines, the injury at issue in Humphries occurred at a location even further removed from the water. While the area in question in that case was found not to constitute a covered situs, it is clear that whether that area touched the water and whether there was any separation of the site from the water, while considered, were not wholly determinative of situs coverage. Under the decision in the immediate case, however, it is likewise clear that whether the site touched the water would have been entirely dispositive of the situs issue in that case. Thus, when scrutinized, Respondent's argument that the current decision can be reconciled with prior Fourth Circuit decisions is wrong both generally and specifically.

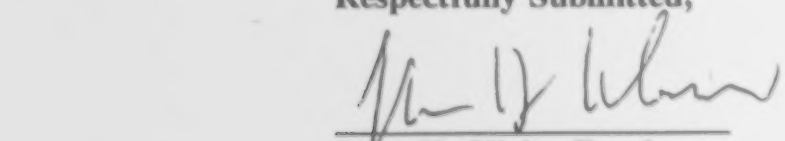
REQUEST FOR CONSOLIDATION

By and through this Reply to Respondent's Brief in Opposition, Petitioner, Christopher S. Sidwell, by counsel, hereby requests that this Honorable Court consolidate for purposes of certiorari review the Petition for Writ of Certiorari filed in this matter with the Petition for Writ of Certiorari filed on the 9th day of May, 1996 in the matter entitled Earl J. Parker, Jr. and Glenn C. Redmon v. Director, OWCP, et al., Record No. _____. In support of said request, Petitioner submits that the two Petitions address an identical issue under the same provision of a single statute, the Longshore and Harbor Workers' Compensation Act, 33

U.S.C. Section 901 et seq. Accordingly, consideration of the two Petitions collectively, as opposed to independently, would both facilitate the review process and would aide the Court in its decision as to whether or not to grant the Writs and address the issue presented.

WHEREFORE, Petitioner requests that this Honorable Court consolidate the Petitions filed in the two matters for purposes of certiorari consideration and any and all subsequent proceedings before the Court.

Respectfully Submitted,



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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTOPHER S. SIDWELL, PETITIONER

v.

EXPRESS CONTAINER SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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22RP

QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer carrying out specified longshoring activities. The question presented is whether a container-repair shop near, but not immediately contiguous to, a marine terminal, is located in an "adjoining area" within the meaning of Section 903(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1569

CHRISTOPHER S. SIDWELL, PETITIONER

v.

EXPRESS CONTAINER SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-XXXIII) is reported at 71 F.3d 1134. The decision and order of the Benefits Review Board (Pet. App. XXXIV-L) are unreported. The decision and order of the administrative law judge (Pet. App. LI-LXIII) are reported at 26 B.R.B.S. (ALJ) 127 (1991).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1995. A sua sponte suggestion of rehearing en banc was denied on January 29, 1996. Pet. App. LXIV-LXV. The petition for a writ of

certiorari was filed on March 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for workplace injuries to persons who meet a "status" requirement, *i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3),[1] and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). This case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that the Act's coverage extends to

> injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Christopher Sidwell is a mechanic who repairs ship cargo containers. He suffered a disabling injury in June 1990 while working at a container repair facility owned and operated by his employer, respondent Express Container Services, Inc. Pet. App. III. Respondent is in the business of

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

repairing cargo containers and the chassis used to carry them. *Ibid.* Petitioner started work for respondent in 1978, when its shop was located just outside the gates of the Portsmouth Marine Terminal. *Id.* at III, LIV, LVI-LVII. Respondent relocated in 1985, when the Virginia Port Authority expanded the terminal and purchased respondent's facility. The new facility, at which petitioner was injured, is located 8/10 of a mile from the terminal gates. *Id.* at XXXVI, LVI. According to respondent's president, the new site was the available property closest to the terminal. *Id.* at LVI. The neighborhood between the terminal and respondent's repair shop is devoted to mixed uses (maritime as well as nonmaritime business and residential). *Id.* at IV, XXXVI, LVI-LVII.

Respondent contracts with shipping lines to repair cargo containers and chassis. Pet. App. III-IV, XXXVII, LV. Respondent performs repairs both shipside at the terminal and at its container repair facility. *Id.* at XXXVII, LIV. At the time of petitioner's injury, respondent employed mechanics who were regularly dispatched from the repair facility to conduct "shipside" or other repairs at the terminal; mechanics who performed "roadability" inspections and repairs as containers left the terminal; a driver who hauled containers between the terminal and respondent's repair facility; and mechanics who, like petitioner, primarily carried out repairs at the repair facility. C.A. App. 19, 21-22, 29, 47-48.

3. When petitioner sought benefits under the LHWCA, respondent denied coverage, arguing that petitioner did not meet the Act's status requirement, 33 U.S.C. 902(3), and that respondent's repair shop is not a covered situs under Section 3(a), 33 U.S.C.

903(a). After a hearing, an administrative law judge (ALJ) ruled that petitioner was engaged in maritime employment, and thus satisfied the status requirement, because the work that petitioner performed—maintenance and repair of cargo containers—is essential to the continued use of containers in longshoring operations. Pet. App. LVIII-LIX. The ALJ concluded, however, that the location at which petitioner was injured fell outside the coverage of Section 903(a). Employing a four-factor test articulated by the Ninth Circuit in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.), the ALJ held that respondent's place of business lacks a "functional relationship" with navigable waters, and thus is not a covered situs. Pet. App. LX-LXII. The ALJ therefore denied the claim for benefits. *Id.* at LXIII.

4. The Benefits Review Board affirmed, ruling that the ALJ had properly applied a "functional relationship" test and that his conclusions were supported by substantial evidence. Pet. App. XXXIV-XLVIII. In the Board's view, the ALJ had reasonably concluded that respondent's business did not require a site particularly well suited for maritime purposes and that the site had been chosen for economic, not geographic reasons. *Id.* at XLIV-XLV. The Board also attached little significance to petitioner's assertion that respondent dispatches workers from the site to perform shipside repairs, since petitioner himself worked only at the container-repair shop and was injured there. *Id.* at XLVI.

5. The court of appeals affirmed. Pet. App. I-XXXIII.[2] The court held that the "adjoining area" to which Section 903(a) refers must be "'contiguous with' or otherwise 'touch[]' [navigable] waters. If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." Pet. App. XVII-XVIII (footnote omitted). The court acknowledged that "dictionaries do include 'neighboring' and 'in the vicinity of' as possible definitions of 'adjoining,'" *id.* at XVI, but stated that "such is not the ordinary meaning of the word," *id.* at XVII.

The court also rejected the contention that "the word 'area' is sufficiently broad that the phrase 'adjoining area' still covers the site where [petitioner's] injury occurred." Pet. App. XVIII. In the court's view, the phrase "other adjoining area" is properly construed by reference to the specific areas —"any adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway," 33 U.S.C. 903(a) —

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[2] Although the clerk of the court of appeals had initially denominated the Director, Office of Workers' Compensation Programs, as a respondent in that court, the court of appeals ruled that the Director was not a proper respondent because he was not a real party in interest. Pet. App. V n.1 (citing *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), and *I.T.O. Corp.* v. *Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded on other grounds, 433 U.S. 904, reinstated in pertinent part, 563 F.2d 646 (1977) (en banc) (per curiam)). The court, however, granted the Director's motion to intervene under Fed. R. Civ. P. 24(b); the Director had sought such intervention in the event he was denied respondent status. Pet. App. V n.1. The Director is therefore a respondent in this Court. See Sup. Ct. R. 12.4.

expressly defined as covered situses. Pet. App. XIX. The court concluded that

> an "other adjoining area" as to which coverage extends must be *like* a "pier," "wharf," "dry dock," "terminal," "building way," or "marine railway." Each of these enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shoreside structure or facility.

Id. at XX (footnote omitted). The court also deemed it "inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area.'" *Id.* at XXI.

Applying its test to the facts of this case, the court concluded that respondent's container-repair shop was not a covered situs. Pet. App. XXV-XXVI. The court concluded that the shop itself, while arguably an "area" within the meaning of Section 903(a), did not "adjoin" navigable waters. Pet. App. XXVI. The court further asserted that the tract of land extending from the water to and including the shop was not an "area" within the meaning of the Act. *Ibid.*[3]

The court also rejected the Director's argument that it should defer to his interpretation of the situs requirement. Pet. App. XXVI-XXX. The court held that LHWCA Program Memorandum No. 58 (1977), upon which the Director relied, did not clearly con-

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[3] The court also stated that it would reach the same result under the *Brady-Hamilton* test or a "totality of the circumstances" test adopted by the Fifth Circuit. Pet. App. XXVI n.12.

stitute an agency interpretation of the Act, since it did not attempt to define a general rule or test for the pertinent statutory phrase or otherwise purport to interpret the Act. Pet. App. XXVII. The court noted as well that the document was an internal memorandum, and therefore, in its view, was entitled to less deference than a formal agency interpretation. *Id.* at XXVII-XXVIII. The court also stated that it was "not certain in any event that the 1977 Memorandum contradicts our interpretation of the statute." *Id.* at XXVIII. Finally, the court held that, if the Memorandum sets forth a formal agency interpretation of Section 903(a), and if that interpretation would extend the Act's coverage to areas that do not adjoin navigable waters, then the Memorandum is contrary to the plain language of the Act and for that reason is not entitled to deference. Pet. App. XXIX-XXX.[4]

The court of appeals subsequently considered a sua sponte suggestion of rehearing en banc and, on an 8-5 vote, denied the suggestion. Pet. App. LXIV-LXV.

ARGUMENT

If the court of appeals' opinion is read to require strict contiguity between a particular place of business and navigable waters, its holding creates a conflict among the circuits and would subvert the effective implementation of the LHWCA. We believe, however, that the opinion below is susceptible of a more limited reading. Even if a square circuit conflict existed, moreover, the instant case would be an

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[4] In a concurring opinion, District Judge Beaty stated that he would apply the Ninth Circuit's *Brady-Hamilton* test and would affirm the ALJ's ruling under that standard. Pet. App. XXX-XXXIII.

inappropriate vehicle for its resolution. The petition for a writ of certiorari should therefore be denied.

1. Prior to the Fourth Circuit's decision in this case, the courts of appeals had consistently held that a maritime facility may be covered by Section 903(a) even if it is not contiguous to navigable waters. Thus, the Ninth Circuit in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978) (Kennedy, J.), held that a gear locker (a building for storage and repair of stevedoring equipment) located 1/2 mile from a navigable river and only a little less from the gate of the port was a covered situs. In so holding, the court rejected the argument that the locker did not "adjoin" navigable waters because it was not contiguous to the river. The court reasoned that, in light of the purposes underlying Congress's 1972 expansion of LHWCA coverage landward, see pages 13-15, *infra*, the phrase "adjoining area" should be interpreted by reference to a "functional relationship that does not in all cases depend upon physical contiguity." 568 F.2d at 141.

The court in *Brady-Hamilton* identified four factors that "among others" should be considered in determining whether a location is a covered "adjoining area": (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to maritime uses; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances. 568 F.2d at 141. Applying that analysis, the court noted that all of the machinery and equipment in the gear locker was used for the loading and unloading of vessels; that adjacent buildings were used as gear lockers; and that the locker was as close

to the ships as was feasible, given that "the water's edge can only accommodate a limited number of warehouses and other docking facilities." *Ibid.* The court concluded that the "facility * * * was used as an integral part of longshoring operations," and therefore was a situs covered by the Act. *Ibid.*

In *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), the court held that a gear locker five blocks from the nearest dock was a covered situs. Like the court in *Brady-Hamilton*, the Fifth Circuit rejected the argument that, for LHWCA jurisdiction to attach, there must be "an uninterrupted line of maritime facilities between the locus of the injury and the water." 632 F.2d at 513. The court observed that the term "adjoining" can mean "neighboring," as well as "contiguous to," and concluded that the former definition is more in keeping with congressional intent. *Id.* at 514. In the court's view, the best way to effectuate the congressional purpose of the 1972 amendments was to "determine the situs question by looking at all the circumstances." *Id.* at 513. The boundaries of the Section 903(a) "area," the court further concluded, should be broadly defined by function, and an "area" falls within the coverage of the LHWCA if it is used customarily, although not exclusively, by employers in loading, unloading, repairing, or building a vessel. 632 F.2d at 515.

Looking at all the circumstances, the Fifth Circuit in *Texports Stevedore* noted that the gear room was not outside the waterfront area customarily used by employers for gear rooms; that it was in the most desirable position for serving the docks and as close a position as feasible; and that the gear rooms of most stevedores were not on the docks proper. 632 F.2d at

515. The court therefore upheld the ALJ's finding that the gear room was in an area customarily used by employers for loading, that that general area adjoined the waterway, and that the gear room itself had a "sufficient nexus to the waterfront" for LHWCA coverage to attach. *Ibid.*[5]

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[5] In *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95 (1991), the Second Circuit, citing *Brady-Hamilton* and *Texports Stevedore*, held that an employee driving a vehicle that was moving cargo between a dockside stevedore facility and a rail yard, who was injured at the latter site, was covered by the LHWCA. The court of appeals held that "[t]he 1 1/4 mile journey to [the rail facility], a journey that is more around the Elizabeth Channel than away from it, is a necessary trip and is, therefore, integral to the loading of cargo." 932 F.2d at 101. In support of its ruling, the court noted that "[i]t [was] generally understood that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a maritime operation." *Id.* at 100 (internal quotation marks omitted). The court also noted that the 1972 LHWCA amendments reflected a "congressional intent to reduce the importance of situs as applied to employees who might otherwise be covered for only a part of their work." *Id.* at 101 (quoting *Cove Tankers Corp.* v. *United Ship Repair, Inc.*, 683 F.2d 38, 42 (2d Cir. 1982)). Although the precise geographic relation of the site of the injury to navigable waters is somewhat unclear from the court's decision, the Second Circuit appears to be in general agreement with the Fifth and Ninth Circuits' approach to the situs inquiry.

The Third Circuit in *Sea-Land Serv., Inc.* v. *Director, OWCP*, 540 F.2d 629 (1976), held that a truck accident on a public street in a "marine terminal area," one-half mile from the nearest water and one-third mile from the nearest terminal, occurred at a situs covered under the Act. The court held that the line "delimiting the outer reaches of the Act's extended coverage is * * * functional and not spatial." *Id.* at 636. It concluded that "[t]he limits of federal coverage is defined not by reference to a geographic relationship with the

2. The Office of Workers' Compensation Programs (OWCP), in an administrative interpretation issued in 1977, concluded that a facility could be a Longshore Act situs even though outside of the fence line or boundary of a terminal that is directly contiguous to the water. Discussing "[s]itus" in the context of "longshoring operations," the LHWCA program memorandum explained that marine terminals are covered in their entirety despite their increasingly large size. See LHWCA Program Memorandum No. 58, at 10-11 (1977). The memorandum concluded:

> In areas in which additional space immediately adjacent to the previously established boundaries of a waterfront pier or terminal is not available for the expansion required by modernization, * * * *such facilities as "gear lockers"—buildings in which stevedoring equipment is maintained and stored (and sometimes fabricated)—may be located outside the fenced boundaries of a terminal.* Such facilities are in practical fact integral parts of the maritime terminal, existing and being used solely for the loading and discharge of ships; they should be regarded as extensions of the terminals to which they relate. Hence, *although they do not themselves adjoin the water, they are*

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navigable waters * * * but by the location of the interface between the air, land and the water modes of transportation." *Id.* at 638. "[A]s long as the employment nexus (status) with maritime activity is maintained," the court held, "the federal compensation remedy should be available." *Ibid.* The Third Circuit's analysis, however, was repudiated by this Court in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278 n.40 (1977), which noted that *Sea-Land* "appears to have essentially discarded the situs test."

> *parts of terminal complexes which do, and are within the Act.*

Id. at 11 (emphases added).[6]

3. As the court of appeals acknowledged, see Pet. App. XVI, the term "adjoining" is susceptible to more than one meaning. The term may mean "contiguous," but it also can reasonably bear the broader meaning of "neighboring" or "close to." See *Texports Stevedore*, 632 F.2d at 514 & nn.17-18 (citing dictionary definitions of "adjoin" and "adjoining"). The term "area" is similarly susceptible to a functional construction that eschews rigid reliance on fence or property

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[6] Congress has conferred on the Secretary broad authority to administer the LHWCA, 33 U.S.C. 939(a), and his delegate, the Director, OWCP, 20 C.F.R. 701.202, is the policymaker under the Act whose views on questions of statutory or regulatory interpretation are entitled to deference. *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1110 (7th Cir. 1992); *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of analogous Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is entitled to deference). But see *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (neither Benefits Review Board nor Director is entitled to deference). The 1977 Program Memorandum, issued over the signature of the highest agency official with administrative authority for the LHWCA program, stated in its cover letter that it "reflect[ed] OWCP's position on the amended coverage of the Act." It remains the agency's most definitive construction of the statutory provision at issue here.

lines.[7] Resolution of those ambiguities should be informed by consideration of the history and purpose of Section 903(a), which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself strictly contiguous to navigable waters.

Until 1972, the LHWCA extended coverage only to injuries that occurred "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). As a result of that limitation on

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[7] The 1977 OWCP Program Memorandum's statement that a gear locker may be a covered situs even where it is "located outside the fenced boundaries of a terminal" is consistent with the subsequent decisions of the Ninth and Fifth Circuits in *Brady-Hamilton* and *Texports Stevedore*. That conclusion, it should be noted, can be derived by either of two interpretive routes. The Program Memorandum took the position that such facilities are covered by the Act because "although they do not themselves adjoin the water, they are parts of terminal complexes which do." Program Memorandum at 11. That view does not contest the proposition that "adjoining" means "contiguous"; it rests instead on the premise that an "area" within the meaning of Section 903(a) may extend beyond a particular parcel of property, such that a maritime terminal and a neighboring gear locker may be said to comprise a single complex or "area." The Ninth Circuit in *Brady-Hamilton*, by contrast, appeared to regard the gear locker itself as the relevant area, and concluded that the locker was properly treated as an "adjoining" area despite the fact that it did not abut the water. See 568 F.2d at 141. The Fifth Circuit in *Texports Stevedore* accepted both arguments. It concluded that the gear locker itself was properly regarded as "adjoining" the water, on the theory that "'[a]djoining' can mean 'neighboring.'" 632 F.2d at 514. In the alternative, it stated that the locker would be covered even if strict contiguity to navigable waters were required, because the locker "was not clearly outside the waterfront area customarily used by employers for gear rooms," and the waterfront area abutted a navigable waterway. *Id.* at 515.

coverage, benefits awarded to longshore or harbor workers could vary substantially depending upon the side of the water's edge on which an accident occurred. See generally *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 260-263 (1977); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972). That disparity was of particular concern because "with the advent of modern cargo-handling techniques, such as containerization, * * * more of the longshoreman's work is performed on land than heretofore." H.R. Rep. No. 1441, *supra*, at 10; S. Rep. No. 1125, *supra*, at 13. Congress amended the Act in 1972, expanding its coverage to specified landward situses and to "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). That expansion of coverage was designed to "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." H.R. Rep. No. 1441, *supra*, at 10-11; S. Rep. No. 1125, *supra*, at 13.[8]

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[8] The 1972 amendments also imposed a new "status" requirement by amending the Act's definition of "employee." Because Congress did not wish to extend coverage to all workers who might be injured in the newly covered landward areas, it limited the Act's coverage to "persons engaged in maritime employment." 33 U.S.C. 902(3); see note 1, *supra*. The amendment ensures that workers not engaged in maritime employment, such as workers picking up stored cargo for transshipment or purely clerical workers not involved in loading or unloading, would not be covered even if injured in the adjoining land area newly subject to LHWCA coverage. H.R. Rep. No. 1441, *supra*, at 11; S. Rep. No. 1125, *supra*, at 13.

Section 903(a) should therefore be construed in a manner that will reduce the number of workers walking in and out of LHWCA coverage and promote uniformity of benefits among maritime employees. *Brady-Hamilton*, 568 F.2d at 140-141; *Reynolds* v. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264, 271-272 (5th Cir.), cert. denied, 479 U.S. 885 (1986). A rigid requirement that particular places of business be directly contiguous to navigable waters would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity." *Texports Stevedore*, 632 F.2d at 514-515. See also *Brady-Hamilton*, 568 F.2d at 141 ("[i]n order to further Congress' goal of uniform coverage, the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity"); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 101 (2d Cir. 1991).

4. We do not read the court of appeals' opinion in this case as establishing a rigid rule that a particular maritime facility must directly abut navigable waters in order to fall within the coverage of Section 903(a). The court was, we acknowledge, unequivocal in its construction of the term "adjoining," holding that "an area is 'adjoining' navigable waters only if * * * it is 'contiguous with' or otherwise 'touches' such waters." Pet. App. XVII. The court did not, however, essay a precise definition of the term "area." Although the court expressed the view that "some notion of property lines will be at least relevant" in determining the scope of a covered "area," *id.* at XXI, it did not hold that a business's placement beyond the

fence line of a maritime terminal would invariably exclude it from the coverage of Section 903(a). To the contrary, the court stated that it was "not certain * * * that the 1977 [OWCP] Memorandum contradicts our interpretation of the statute." Pet. App. XXVIII. It simply concluded that "the expanse of property between the navigable waters and [respondent's container-repair shop] (together with structures and facilities that occupy that property) * * * is not an 'area' within the meaning of the statute." *Id.* at XXVI. Until the Fourth Circuit has considered the application of Section 903(a) to a broader range of factual settings, we believe that review by this Court would be premature.

Even if the court of appeals' decision were construed as creating a square conflict among the circuits, moreover, the instant case would not furnish an appropriate vehicle for resolution of that conflict. The panel majority held (albeit without extensive analysis) that respondent's container-repair shop would fall outside the coverage of Section 903(a) even under the test adopted by the Ninth Circuit in *Brady-Hamilton*. Pet. App. XXVI n.12. The concurring judge reached the same conclusion, see *id.* at XXX, as did the ALJ and the Board, see *id.* at LI-LXIII, XXXIV-XLVIII. That fact-bound conclusion provides an independent basis for the court of appeals' judgment. While the correctness of that alternative holding is open to question, application of the appropriate functional analysis to the facts of a particular case raises no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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